U.S. Court of Appeals for the Federal Circuit

ROCKNEL FASTENER, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01–1006

(Decided October 4, 2001)

Steven P. Sonnenberg, Sonnenberg & Anderson, of Chicago, Illinois, argued for plaintiff-appellant. Of counsel was *Michael J. Cunningham*.

Amy M. Rubin, Attorney, Civil Division, Commercial Litigation Branch, International Trade Field Office, of New York, New York, argued for defendant-appellee. With her on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC; and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Sheryl A. French*, Attorney, Office of Assistant Chief Counsel, United States Customs Service, of New York, New York.

Appealed from: United States Court of International Trade
Judge RICHARD W. GOLDBERG

Before SCHALL, BRYSON, and DYK, *Circuit Judges*.

BRYSON, *Circuit Judge*.

Rocknel Fastener, Inc., appeals from the decision of the Court of International Trade upholding the tariff schedule classification by the United States Customs Service of certain fasteners imported by Rocknel. *Rocknel Fastener, Inc. v. United States*, 118 F. Supp. 2d 1238 (Ct. Int'l Trade 2000). We affirm.

I

The products at issue in this case consist of a variety of metal fasteners that Rocknel imported from Japan in 1997. The fasteners, which are fabricated from metal alloys, have rod-shaped bodies and hexagonally shaped heads. Their bodies are fully or partially threaded. Rocknel has admitted that the fasteners were designed to be installed in holes of assembled parts and that the fasteners were designed to be tightened or released by turning their heads.

The Customs Service liquidated the fasteners under subheading 7318.15.80 of the Harmonized Tariff Schedule of the United States

("HTSUS"). Subsequently, Rocknel filed a protest, claiming that the fasteners should have been classified under HTSUS subheading 7318.15.20.

Heading 7318 of the HTSUS covers "screws, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers * * * and similar articles of iron and steel." Six-digit subheading 7318.15 narrows that category to threaded articles consisting of "other screws and bolts." That six-digit subheading is further divided into several eight-digit subheadings, including the two at issue in this case. Subheading 7318.15.20, which Rocknel argues should have been applied to the fasteners in this case, covers "bolts." Subheading 7318.15.80, which Customs applied, covers "other" items having threads with a diameter of six millimeters or more.

After Customs denied the protest, Rocknel appealed to the Court of International Trade. The court concluded that the tariff schedule required that the terms "bolt" and "screw" be given mutually exclusive definitions. The court further concluded that the definition of the terms "bolt" and "screw" found in Specification B18.2.1, Specifications for Identification of Bolts and Screws, published by the American National Standards Institute (ANSI) and the American Society of Mechanical Engineers (ASME) ("the ANSI Specification") accurately reflected both the common and the commercial meaning of those terms. Because Customs had looked to the ANSI Specification as the source of the definitions of "bolt" and "screw" for tariff classification purposes, and because Rocknel had admitted that under the ANSI Specification the fasteners at issue in this case would be classified as screws and not bolts, the court granted summary judgment to Customs upholding the agency's classification of the fasteners. This appeal followed.

II

A

The meaning of a tariff term, a matter of statutory construction, presents a question of law. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1366 (Fed. Cir. 1998). When, as in this case, a tariff term is not defined in either the HTSUS or its legislative history, "the term's correct meaning is its common meaning." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1087 (Fed. Cir. 1994). The common meaning of a term used in commerce is presumed to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To ascertain the common meaning of a term, a court may consult "dictionaries, scientific authorities, and other reliable information sources" and "lexicographic and other materials." *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (CCPA 1982); *Simod*, 872 F.2d at 1576.

The government agrees with the Court of International Trade that the ANSI Specification represents the common meaning of the terms "bolt" and "screw." Rocknel disputes that the ANSI Specification embodies the common meaning of the terms and asserts that Customs has not satisfied its burden of showing why a non-common meaning should be adopted. *See Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984) ("One who argues that a term in the tariff laws should not be given its common or dictionary meaning must prove that there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade.").

B

At the outset, we must consider whether, and to what extent, Customs' classification decision in this case is entitled to deference. The Court of International Trade, relying on this court's decision in *Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999), concluded that no deference was due Customs' classification. Although the Court of International Trade correctly applied our decision in *Mead*, that decision has been superseded by the Supreme Court's subsequent decision in the *Mead* case. *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001). The Supreme Court held that when Customs has not promulgated a regulation, but has simply issued a classification ruling implicitly interpreting an HTSUS provision, the ruling is not entitled to so-called *Chevron* deference, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Nonetheless, the Court held that a classification ruling is entitled to some deference in accordance with the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead*, 121 S. Ct. at 2168; *see also Gen. Elec. Co.—Med. Sys. Group v. United States*, 2001 U.S. App. LEXIS 15971 (Fed. Cir. July 17, 2001); *Heartland By-Products, Inc. v. United States*, 2001 U.S. App. LEXIS 19346 (Fed. Cir. Aug. 30, 2001). As the Court explained in *Skidmore*,

> The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140. Likewise, *Mead* indicates that when considering the degree of deference to accord a Customs classification ruling, a court should consider "its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." 121 S. Ct. at 2176.

Customs has not issued a regulation regarding construction of the terms "bolt" and "screw" in the tariff schedule. However, Customs' policy of applying the ANSI Specification has been established in Headquarters Ruling Letters dating back more than 16 years, *see* Headquarters Ruling Letter 951362 (June 24, 1992); Headquarters Ruling Letter 074950 (Feb. 15, 1985), and in a Customs Service publication, *Distinguishing Bolts from Screws* (April 1995). The rulings and the publication contain detailed guidance as to the distinction between bolts and screws, consistent with the ANSI Specification. Because the classification in this case is supported by thorough analysis in Customs' publications and decisions, and is consistent with prior interpretations of the pertinent provisions of the HTSUS by Customs over a period of years, the Supreme Court's decision in *Mead* indicates that Customs' decision to interpret the provisions of HTSUS subheadings 7318.15.20 and 7318.15.80 according to the definitions contained in the ANSI Specification must be accorded some deference by the courts. As the Supreme Court recognized, the regulatory scheme at issue in this case is highly detailed, and Customs "can bring the benefit of specialized experience to bear on the subtle questions in this case." *Mead*, 121 S. Ct. at 2175. For that reason, while we recognize our independent responsibility to decide the legal issue of the proper tariff classification in this case, we also recognize our responsibility to give some deference to Customs' interpretation as we do so.

C

Rocknel argues that the Court of International Trade erred when it assigned the terms "bolt" and "screw" mutually exclusive definitions. Rocknel asserts that because subheading 7318.15.20 is an *eo nomine* classification for "bolts," while subheading 7318.15.80 is a "basket" category for "other" products, the correct classification requires only that a particular fastener satisfy the definition of a "bolt," regardless of whether it might also be regarded as being a screw.

We agree with the Court of International Trade that whether or not heading 7318.15.80 is considered to be a "basket" category, the structure of the tariff schedule requires that the terms "bolt" and "screw" be given mutually exclusive definitions. Simply put, because subheading 7318.15 covers bolts and screws, and subheading 7318.15.20 covers bolts, subheading 7318.15.80 is necessarily limited to screws. Therefore, the proper classification of a particular fastener requires a determination whether the fastener is a bolt or a screw and does not allow for the possibility that the fastener might qualify as either.

D

The ANSI Specification that Customs adopted as the basis for its distinction between bolts and screws is included in *Fastener Standards* (6th ed. 1988), which is published by the Industrial Fasteners Institute. The ANSI Specification begins with two general definitions:

> Bolt: A bolt is an externally threaded fastener designed for insertion through holes in assembled parts, and is normally intended to be tightened or released by torquing a nut.
>
> Screw: A screw is an externally threaded fastener capable of being inserted into holes in assembled parts, of mating with a preformed internal thread or forming its own thread, and of being tightened or released by torquing the head.

The specification then presents four primary criteria, two of which define products that are always bolts and two of which define products that are always screws. The primary criteria dictate that an externally threaded fastener is a bolt if it can be tightened or released only by torquing a nut or if it must be assembled with a nut to perform its intended service. The fastener is a screw, according to the primary criteria, if its thread form prevents it from being assembled with a nut having a straight thread of multiple pitch length, or if it must be torqued by its head into a tapped or other preformed hole to perform its intended service. The parties agree that the imported products at issue in this case are not governed by any of the four primary criteria.

The specification continues by providing nine supplemental criteria to be used in defining fasteners that cannot be identified based on the primary criteria. The specification explains that if a fastener satisfies a majority of the supplemental criteria, it is classified as a screw. The nine criteria are, in summary: (1) the fastener has a controlled fillet at the junction of the head and the body; (2) the under head bearing surface of the fastener is smooth and flat; (3) the angularity of the under head bearing surface of the fastener is controlled; (4) the body of the fastener is closely controlled in accuracy of size and roundness; (5) the shank of the fastener is particularly straight; (6) the threads of the fastener are concentric with the body axis; (7) the length of the thread on the fastener is sufficient to develop the full strength of the fastener; (8) the fastener has a chamfered or other specially prepared point at its end; and (9) the length of the fastener is closely toleranced. The parties agree that the imported fasteners satisfy a majority of those nine criteria.

Customs argues that the definitions of bolt and screw embodied in the ANSI Specification should be used for tariff purposes because those definitions conform to the common meaning of the terms. To test that proposition, we look to several technical and general dictionary definitions:

> The bolt is described as an externally threaded fastener designed for insertion through holes in assembled parts. It is normally tightened and released by turning a mated nut. A screw differs from a bolt in that it is supposed to mate with an internal thread into which it is tightened or released by turning its head. These definitions obviously do not always apply, since bolts can be screwed into threaded holes and screws can be used with nuts.

Millwrights and Mechanics Guide 371 (4th ed. 1986), *quoted in Rocknel*, 118 F. Supp. 2d at 1243.

> A bolt is an externally threaded fastener designed for insertion through holes in assembled parts, and is normally intended to be tightened or released by torquing a nut.
>
> A screw is an externally threaded fastener capable of being inserted into holes in assembled parts, or mating with a preformed internal thread or forming its own thread and of being tightened or released by torquing the head.

Erik Oberg et al., *Machinery's Handbook* 1417 (25th ed. 1996).

> Bolt: "A threaded metal rod or pin for joining parts, having a head and usually used with a nut."
>
> Screw: "A mechanical device for fastening things together, consisting essentially of a cylindrical or conical piece of metal threaded evenly around its outside surface with an advancing spiral ridge

> and commonly having a slotted head: it penetrates only by being turned, as with a screwdriver."

Webster's New World Dictionary 157, 1206 (3d ed. 1988), *quoted in Rocknel*, 118 F. Supp. 2d at 1241–42.

> Bolt: "A fastener consisting of a threaded pin or rod with a head at one end, designed to be inserted through holes in assembled parts and secured by a mated nut that is tightened by applying torque."
>
> Screw: "A cylindrical rod incised with one or more helical or advancing spiral threads. * * * A metal pin with incised threads and broad slotted head that can be driven as a fastener by turning with a screwdriver * * *."

American Heritage Dictionary of the English Language 213, 1622 (3d ed. 1996), *quoted in Rocknel*, 118 F. Supp. 2d at 1241–42.

> Bolt: "A rod or heavy pin (as one made of steel) designed to fasten two or more objects (as metal plates) together or to hold one or more objects in place often having a head at one end and a screw thread cut upon the other and being usually secured by a nut or by turning."
>
> Screw: "A cylinder with a helical cut groove on the outer surface or a cone with a conical spiral groove used variously (as to fasten, apply pressure, transmit motion, or make adjustments) especially where a large mechanical advantage and irreversible motion are desired; specifically: a small cylindrical or conical metal screw with a slotted or recessed head used alone or when cylindrical with a nut to unite two objects or to fasten one or more objects usually by being rotated (as with a screwdriver)."

Webster's New International Dictionary 249, 2041 (3d ed. 1968).

A comparison of the ANSI Specification with the various dictionary definitions reveals that the general ANSI definitions and primary criteria, which focus on whether the fastener is designed to be torqued by tightening the head or a nut, conform well to the distinctions made in the dictionary definitions. The supplemental criteria of the ANSI specification, while not inconsistent with the dictionary definitions, contain detail that goes beyond the definitions found in both the technical and general dictionaries.

In its briefs to this court and at oral argument, Rocknel proposed its own definition of the term "bolt," which it contends represents the common meaning of the term. Under that definition, a bolt "includes partially threaded fasteners used to hold or fasten objects together, and capable of being torqued by the head or by the nut." That definition, which uses the term "includes" and thus is open-ended, consists of three elements: bolts are (1) partially threaded, (2) used to hold or fasten objects together, and (3) capable of being torqued by the head or by a nut. In contrast, Rocknel argues, "the shanks of screws * * * are fully threaded from the point to the head, are sometimes pointed, are often turned with a screwdriver, and are capable of fastening or transmitting motion."

Rocknel's proposed definition has several defects. First, Rocknel's reliance on the distinction between fully and partially threaded rods is not reflected in any of the dictionary definitions. Rocknel relies for that distinction on the Explanatory Notes to the HTSUS, which were prepared by the World Customs Organization to accompany the international harmonized schedule. The Explanatory Notes, however, do not rely on partial threading as a firm criterion for classifying bolts and screws, but merely state that screws for metal are "generally threaded throughout their length whereas bolts usually have a part of the shank unthreaded." Customs Co-operation Council, *Harmonized Commodity Description and Coding System* § 73.18, Explanatory Note (A) (1988). Furthermore, although the Explanatory Notes may offer guidance in interpreting subheadings in the HTSUS, they are not considered controlling. *See Totes, Inc. v. United States*, 69 F.3d 495, 500 (Fed. Cir. 1995).

The two remaining factors in Rocknel's proposed definition of bolts—that bolts are used to fasten objects together and that they are capable of being torqued by the head or by a nut—are not at all helpful because they fail to provide any useful distinction between bolts and screws. Both screws and bolts are used to hold or fasten objects together, and all screws are capable of being torqued by the head. Rocknel's observation that screws are "sometimes" pointed and are "often" turned with a screwdriver is also unhelpful, as it does not address the circumstances in which objects that are not pointed and are not turned with a screwdriver may still be considered screws.

Because the dictionary definitions of the terms "bolt" and "screw," such as those quoted above, are not sufficiently precise to distinguish between bolts and screws in all cases, it was reasonable for Customs to adopt the definitions of "bolt" and "screw" in the ANSI Specification, which are consistent with the dictionary definitions but supplement those definitions where needed to draw fine distinctions between the two terms. Standards promulgated by industry groups such as ANSI, ASME, and others are often used to define tariff terms, *see, e.g.*, *Hafele Am. Co. v. United States*, 870 F. Supp. 352, 355 (Ct. Int'l Trade 1994) (using ANSI/ASME Specification B18.2.1); *Wash. Int'l Ins. Co. v. United States*, 803 F. Supp. 420, 422 (Ct. Int'l Trade 1992) (using ASTM standard), *aff'd*, 24 F.3d 224 (Fed. Cir. 1994), and as noted above, Customs has applied the ANSI Specification in distinguishing between screws and bolts from a time even before the enactment of the HTSUS.

This is not a case in which there is a conflict between the dictionary meanings and a commercial standard. *See Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097–98 (Fed. Cir. 1984); *Winter-Wolff, Inc. v. United States*, 996 F. Supp. 1258, 1263 (Ct. Int'l Trade 1998). Rather, it involves an authoritative industry source that is generally consistent with the dictionary definitions and has been used to supplement the dictionary definitions with additional necessary precision. *See Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789–90 (Fed. Cir. 1988).

Applying the principles of deference set forth in the Supreme Court's decision in *Mead*, we conclude that Customs' construction of the statute has persuasive power and is entitled to deference. Customs' definition is consistent with the dictionary definitions, it is reflected in Customs classification rulings and a Customs publication specifically addressed to the issue, and it reflects an effort by a national standard-making organization to provide a basis for distinguishing the two types of fasteners without departing from the common understanding of the terms. Customs' choice of definitions for the terms is especially reasonable in light of the failure of the party protesting the classification to offer alternative definitions that are more consistent with the common meaning and are useful in making classification decisions. We therefore uphold the judgment of the Court of International Trade sustaining Customs' classification ruling.

AFFIRMED.

SHAKEPROOF ASSEMBLY COMPONENTS DIVISION OF ILLINOIS TOOL WORKS, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 00–1521

(Decided October 12, 2001)

Stephen M. Creskoff, Creskoff & Doram LLP, of Washington, DC, argued for plaintiff-appellant. Of counsel was *Lisa E. Smilan*.

Lucius B. Lau, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief was *David M. Cohen*, Director. Of counsel were *Robert E. Nielsen*, *John D. McInerney*, and *Berniece A. Browne*, Attorneys, Department of Commerce, of Washington, DC.

Appealed from: United States Court of International Trade
Judge JUDITH M. BARZILAY

Before CLEVENGER, SCHALL, and GAJARSA, *Circuit Judges*.

GAJARSA, *Circuit Judge*.

This case involves the appeal of the decision of the United States Court of International Trade that sustained the final antidumping determination issued by the United States Department of Commerce International Trade Administration ("Commerce"). *Shakeproof Assembly Components v. United States*, 102 F. Supp. 2d 486 (Ct. Int'l Trade 2000) ("*Shakeproof II*"). On November 19, 1997, Commerce issued its final determination regarding "Certain Helical Spring Lock Washers from the People's Republic of China." *See* Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 61794–801 (Nov. 19, 1997) ("Final Determination"). The antidumping determination encompasses Helical

Spring Lock Washers ("Washers") imported from Chinese manufacturer Zhejian Wanxin Group, Ltd. ("ZWG") between October 1, 1995 and September 30, 1996. Commerce ultimately assigned an antidumping margin of 14.15% on Washers imported from ZWG during the period of review. Shakeproof Assembly Components ("Shakeproof"), a United States manufacturer of Washers, challenges the methodology used by Commerce in its final determination. Shakeproof argues that the antidumping margin should instead be approximately 38%, based on its asserted normal value of the steel wire rod ("steel") used to manufacture the Washers.[1]

For the reasons discussed below, we affirm.

I. BACKGROUND

On November 19, 1997, Commerce issued its Final Determination in this case. 62 Fed. Reg. 61794–801 (Nov. 19, 1997). Shakeproof challenged the determination before the United States Court of International Trade, and disputed the methodology by which Commerce calculated the value of the steel used to manufacture the Washers. Shakeproof argued that it was improper for Commerce to determine the value of the steel based on the price paid for steel imported by ZWG from the United Kingdom. Specifically, ZWG purchased approximately one-third (34.7%) of its steel from the United Kingdom, and the remaining two-thirds (65.3%) from domestic Chinese producers. Commerce established the normal value of 100% of the steel based on the import price of the steel purchased from the United Kingdom. Shakeproof argued that the normal value of the domestically purchased Chinese steel should instead be determined based on the "factors of production" using India as a surrogate country pursuant to 19 U.S.C. § 1677b(c) (1994).

On July 29, 1999, the United States Court of International Trade remanded the case in order for Commerce to further explain "how its use of import prices to value the entire factor of production for steel wire rod promoted accuracy, including but not limited to how it was more accurate than the use of the surrogate value." *Shakeproof Assembly Components v. United States*, 59 F. Supp. 2d 1354, 1360–61 (Ct. Int'l Trade 1999) ("*Shakeproof I*"). The trial court reasoned that "[w]hether Commerce's use of imported prices to value an entire factor of production is reasonable is inextricably linked to whether the methodology promotes accuracy." *Id.* at 1358 (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1445 (Fed. Cir. 1994)).

On September 27, 1999, Commerce responded to the trial court's remand order by issuing an additional explanation, entitled Final Results

[1] The normal value of goods in "market economy" cases is generally the price at which the foreign product is first sold in the exporting country. 19 U.S.C. § 1677b(a)(1)(B)(i) (1994). In nonmarket economies such as China, there is a presumption that exports are under the control of the state. Thus, the normal value of goods in non-market economies may be instead determined by looking at the "factors of production" used to manufacture the goods. 19 U.S.C. § 1677b(c) (1994). The "factors of production" analysis is discussed, *infra*

of Redetermination on Remand ("Remand Determination"). The Remand Determination stated:

> The purpose of the factors of production methodology is to determine what [normal value] would be if the producer's costs were set by the market forces in a comparable economy. Because the import price is an actual market price paid by the [non-market economy] producer it provides a more accurate value than other potential surrogates. Therefore, the actual price paid for the imports constitutes the best available information for valuing this factor.

Commerce explained that, "the actual price paid for inputs imported from a market economy in meaningful quantities is the best available information and promotes accuracy in the dumping calculation." Commerce further stated that it would find imports "meaningful" if it could "reasonably conclude from the quantities sold, and other aspects of the transactions, that the price paid is a reliable market economy value for the input." Commerce indicated that, in the present case, ZWG purchased 65.3% of the steel from seven domestic Chinese suppliers, and imported 34.7% of the steel from the United Kingdom. Commerce also noted that the amount imported from the United Kingdom "exceeded the amounts purchased from any one of the seven" domestic Chinese suppliers. Commerce determined that ZWG imported "meaningful" amounts of identical steel from the United Kingdom. Moreover, Commerce explained why the import price was more accurate than a surrogate value:

> In [non-market economy] countries we do not have market economy prices and, thus, are forced to resort to the best available information, which is often a surrogate value. At best, this surrogate value represents only an estimate of what [a non-market economy] producer might pay for the factor in question if it were operating in a market economy setting. In this case, however, we have an actual, market economy price for steel wire rod paid by the [non-market economy] producer in question. It is an actual price determined by market economy forces which has been paid to the market economy supplier by the respondent in convertible currency. Thus, the actual market economy price is both reliable and accurate.

Thus, Commerce concluded that the United Kingdom import price was a more reliable and more accurate basis for establishing the normal value of the domestic steel.

On June 9, 2000, the United States Court of International Trade affirmed the Remand Determination. *Shakeproof II*, 102 F. Supp. 2d at 496. The trial court reasoned that the Remand Determination demonstrated "how its use of import prices promotes accuracy." *Id.* at 495. Shakeproof timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (1994).

II. STANDARD OF REVIEW

The Court of International Trade reviews Commerce's decision to determine whether it is "unsupported by substantial evidence in the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). We reapply this standard of review to Commerce's determination. *Cemex v. United States*, 133 F.3d 897, 900 (Fed. Cir. 1998).

We review questions of statutory interpretation without deference. *U.S. Steel Group v. United States*, 225 F.3d 1284, 1286 (Fed. Cir. 2000). In reviewing an agency's construction of a statute that it administers, this court addresses two questions as required by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, this court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, Congress has not spoken directly on the issue, this court addresses the second question of whether the agency responsible for filling a gap in the statute has rendered an interpretation that "is based on a permissible construction of the statute." *Id.*; *see also United States v. Mead Corp.*, 121 S. Ct. 2164, 2185 (2001); *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1308 (Fed. Cir. 2001). In other words, Commerce's interpretation will not be set aside unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

In antidumping cases, this court has previously recognized "Commerce's special expertise," and it has "accord[ed] substantial deference to its construction of pertinent statutes." *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997). Even where Commerce has not engaged in notice-and-comment rulemaking, its statutory interpretations articulated in the course of antidumping proceedings draw *Chevron* deference. *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001) (holding that an "[a]dministrative interpretation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Am. Silicon Techs. v. United States*, 261 F.3d 1371 (Fed. Cir. 2001). *See also Pesquera Mares Australes Ltda. v. United States, et al*, No. 00–1427, 2001 WL 1117927 (Fed. Cir. Sept. 25, 2001).

III. DISCUSSION

Commerce's decision to determine the normal value of all steel based on the purchase price of steel imported from the United Kingdom is based on its interpretation of 19 U.S.C. § 1677b(c) (1994). The statutory provision requires Commerce to determine the normal value of merchandise exported from a non-market economy country "on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1) (1994). Specifically, the statute provides:

> [T]he valuation of the factors of production shall be based on the *best available information* regarding the values of such factors in a

> market economy country or countries considered to be appropriate by the administering authority.

19 U.S.C. § 1677b(c)(1) (1994) (emphasis added). In valuing the factors of production, the statute requires Commerce to:

> [U]tilize, *to the extent possible*, the prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.

19 U.S.C. § 1677b(c)(4) (1994) (emphasis added).

The statutory provisions specifically authorize Commerce to use surrogate countries to estimate the value of the factors of production. However, the statute does not *require* Commerce to always use surrogate country values. The process of constructing foreign market value for a producer in a non-market economy country is difficult and necessarily imprecise. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). "While § 1677b(c) provides guidelines to assist Commerce in this process, this section also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines." *Id.* Indeed, we have specifically held that Commerce may depart from surrogate values when there are other methods of determining the "best available information" regarding the values of the factors of production. *Lasko*, 43 F.3d at 1446; *see also Nation Ford*, 166 F.3d at 1378 n.5 ("The statute does not preclude consideration of pricing or costs beyond the surrogate country if necessary."). In *Lasko*, Commerce issued a final antidumping determination on certain fans imported from China. In that case, Commerce determined the normal value based on both surrogate values and known prices paid for certain manufacturing supplies on the international market. We held that this methodology was a reasonable interpretation of the statutory provisions. Specifically, we reasoned:

> The Act simply does not say—anywhere—that the factors of production must be ascertained in a single fashion. The Act requires the [Commerce] determination to be based on the best available information * * *. In this case, the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was the price charged for those supplies on the international market.

Lasko, 43 F.3d at 1446. We reasoned that the purpose of the statutory provisions is to determine antidumping margins "as accurately as possible." *Id.* We also observed that "[w]here we can determine that a [nonmarket economy] producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, *be contrary to the intent of the law.*" *Id.* (emphasis added). Thus, there is no question that Commerce may determine the normal value of the steel imported from the United Kingdom based on the actual purchase price.

However, Shakeproof argues that Commerce improperly determined the normal value of the domestically produced steel by extrapolating the purchase price of the steel imported from the United Kingdom to the domestically produced steel. We disagree. As we observed in *Lasko*, the statute does not require the factors of production to be ascertained in a single fashion. 43 F.3d at 1446. Moreover, the statute does not require that Commerce always use surrogate country values. Indeed, the statute requires the valuation of the factors of production to be based "on the best available information." 19 U.S.C. § 1677b(c)(1) (1994). Surrogate country values represent only an *estimate* of what a non-market economy manufacturer might pay in a market economy setting. Thus, the statute recognizes that surrogate values are used only "to the extent possible." 19 U.S.C. § 1677b(c)(4) (1994).

In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible. Commerce argues that the actual price paid for inputs imported from a market economy in meaningful quantities is the best available information and promotes accuracy in the dumping calculation. Commerce notes that the value of the factors of production for domestically purchased merchandise may be obtained by extrapolating the market economy import price only when a "meaningful" amount of merchandise is imported. Although we recognize that the level of a "meaningful" amount of imported merchandise must be determined on a case-by-case basis, we are persuaded that the steel imported from the United Kingdom in this case constitutes a "meaningful" amount. The steel imported from the United Kingdom constitutes approximately one-third of all steel used by ZWG in manufacturing the Washers. Moreover, the amount of steel imported from the United Kingdom exceeds the amount purchased from any one of the seven domestic Chinese steel suppliers.

Commerce contends that using the actual import price of steel purchased from the United Kingdom is more accurate than the use of surrogate data. In *Lasko*, we recognized that surrogate country values are, at best, an *estimate* of the true value of the factors of production. 43 F.3d at 1445. In this case, however, one-third of the steel was purchased from a market economy country, with a price set by market forces in an arms length transaction. Commerce notes that the steel purchased from the United Kingdom is identical to the steel purchased from domestic Chinese suppliers. Thus, we agree that the best available and most accurate information regarding the normal value of the domestically obtained steel is the purchase price of the steel imported from the United Kingdom. Commerce's Remand Determination demonstrates that the methodology used in this case is a permissible interpretation of 19 U.S.C. § 1677b(c) (1994). *Chevron*, 467 U.S. at 843.

Shakeproof advances three additional arguments. First, Shakeproof contends that the Remand Determination is vague and does not adequately comply with the remand order issued by the Court of International Trade. Shakeproof argues that we should remand this case and instruct Commerce to more specifically show how the methodology used in this case promotes accuracy. However, we agree with the trial court, that "Commerce sufficiently followed the [c]ourt's mandate." *Shakeproof II*, 102 F. Supp. 2d at 492. The Remand Determination adequately and thoroughly explains why the methodology used in this case is more accurate than surrogate values.

Second, Shakeproof maintains that Commerce failed to assess the reliability of the import prices under the more exacting analysis described in *Olympia Indus., Inc. v. United States*, 36 F. Supp. 2d 414, 416 (Ct. Int'l Trade 1999). However, as recognized by the trial court, "a critical difference exists between the facts of *Olympia* and the facts of this case." *Shakeproof II*, 102 F. Supp. 2d at 494. In *Olympia*, Commerce used a three-part analysis to assess the reliability of import prices paid by a Chinese trading company that resold the inputs to Chinese manufacturers. In this case, however, "the [Chinese] producer purchased its steel wire rod from a market economy supplier through a market economy trading house and paid in market economy currency." *Shakeproof II*, 102 F. Supp. 2d at 494. Thus, Commerce is not required to apply the analysis used in *Olympia* to this case.

Third, Shakeproof argues that Commerce failed to verify ZWG's import data. Commerce is required to verify the information used in making a final antidumping determination if:

> (A) verification is *timely requested* by an interested party * * * *and* (B) no verification was made under this subparagraph during the 2 immediately preceding reviews and determinations * * * except that this clause shall not apply if good cause for verification is shown.

19 U.S.C. § 1677m(i) (1994) (emphasis added). In all cases, therefore, verification must be timely requested by an interested party. Shakeproof concedes that it did not request verification, but maintains that it did not have a reasonable opportunity to request verification because it was unaware that Commerce would use the import prices. Commerce, however, states that Shakeproof could have requested "good cause" verification during the administrative review. Shakeproof cannot now argue that the information should have been verified when it failed to timely request verification as required by statute. We also note that verification had occurred during the first administrative review. Thus, even if Shakeproof had made a request, Commerce need have only verified information upon a showing of good cause. Based on its analysis of the information, Commerce concluded that further verification was not warranted. Commerce did not abuse its discretion by determining that there was not "good cause" for further verification. *Cf. Micron Technology, Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) (holding

that we review Commerce's verification procedures for an abuse of discretion).

IV. CONCLUSION

For the reasons discussed, the decision of the Court of International Trade is

COSTS

No costs.

AFFIRMED.

THAI PINEAPPLE CANNING INDUSTRY CORP. AND MITSUBISHI INTERNATIONAL CORP., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE, AND MAUI PINEAPPLE CO., LTD. AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, DEFENDANTS

Appeal No. 00–1445

(Decided December 6, 2001)

Arthur J. Lafave, III, Dickstein Shapiro Morin & Oshinsky LLP, of Washington, DC, argued for plaintiffs-appellants. With him on the brief were *Douglas N. Jacobson*, and *Shibani Malhotra*.

Lucius B. Lau, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-cross appellant. On the brief was *David M. Cohen*, Director. Of counsel were *Berniece A. Browne*, *John D. McInerney*, *David W. Richardson*, and *Scott McBride*, Attorney, Department of Commerce, of Washington, DC.

Appealed from: United States Court of International Trade
Judge JANE A. RESTANI

Before LOURIE, *Circuit Judge*, PLAGER, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

PLAGER, *Senior Circuit Judge*.

This case involves the determination of antidumping duties for canned pineapple fruit ("CPF") from Thailand. Thai Pineapple Canning Industry Corporation ("TPC") raises two issues on appeal from the Court of International Trade. First, TPC challenges the methodology used in this case by the Department of Commerce ("Commerce") to determine cost of production and constructed value. The question is what is the proper methodology in computing antidumping margins during a period of rising costs when there is a significant lag time between the production of merchandise and its sale. Second, TPC contends that during an administrative review of an antidumping order, Commerce should not compute a single assessment rate for the entire period of review, but instead should compute two assessment rates, one for the period between Commerce's preliminary determination of sales at less than fair value and the International Trade Commission's affirmative injury determination, and a second rate for the remainder of the period of review after the Commission's injury determination. Because we conclude that Commerce's cost of production methodology is not reasonable in this case, we reverse the Court of International Trade's decision on that issue. We affirm the decision regarding the use of a single assessment rate for the entire period of review.

BACKGROUND

I.

A.

Commerce is required to impose an antidumping duty on imported merchandise that is being sold, or is likely to be sold, in the United States at less than fair value to the detriment of a domestic industry. 19 U.S.C. § 1673 (1994). Commerce determines the duty by calculating the dumping margin, i.e., the amount by which the "normal value" (typically the price charged for similar merchandise sold for consumption in the exporting country) exceeds the "export price" or "constructed export price" (the price charged for the subject merchandise in the United States). *Id.* § 1677(35)(A). Commerce uses the dumping margin as "the basis for the assessment of * * * antidumping duties on entries of merchandise covered by the [antidumping] determination and for deposits of estimated duties." *Id.* § 1675(a)(2)(C).

Normal value preferably is based on sales of the foreign like product in the exporting country. *Id.* § 1677b(a)(1)(B). When no foreign like product is sold for consumption in the exporting country, or the quantity sold is insufficient to permit a proper comparison with sales in the United States, normal value may be based on the price at which the foreign like product is sold in a third country. *Id.* § 1677b(a)(1)(B), (C). Regardless of whether normal value is based on sales in the exporting country or in a third country, Commerce may undertake a below-cost sales investigation whenever it has reasonable grounds to believe that those sales have been made at prices less than the cost of production. *Id.* § 1677b(b). If Commerce determines that sales below the cost of production have been made within an extended period of time in substantial quantities, it may disregard such sales when determining normal value, which then will be based on the remaining sales of the foreign like product in either the exporting country or third country. *Id.* If no sales remain, normal value will be based on the constructed value of the merchandise. *Id.* § 1677b(b), (e).

Cost of production is calculated according to a statutory formula by adding together several costs and expenses, including the cost of materials, fabrication, containers, coverings, and other processing costs, and selling, general, and administrative expenses. *Id.* § 1677b(b)(3). The constructed value of merchandise, which is the basis for normal value when there are insufficient sales in the exporting country or a third country, is the sum of the same costs and expenses used to calculate cost of production, plus realized profits. *Id.* § 1677b(e). When normal value is based on sales in the exporting country or a third country, the effect of a higher cost of production is a higher normal value because more lower-priced sales will be disregarded. When normal value is based on constructed value, the effect of a higher cost of production is also a higher normal value because cost of production is the main component of constructed value. Thus, regardless of whether normal value is based on actual sales or constructed value, a higher cost of production brings about a higher normal value, which in turn creates a higher dumping margin. It is therefore advantageous to a foreign producer to demonstrate as low a cost of production as possible.

B.

On July 18, 1995, Commerce published an antidumping duty order on CPF from Thailand. *Antidumping Duty Order on Canned Pineapple Fruit from Thailand*, 60 Fed. Reg. 36,775 (July 18, 1995). On August 15, 1996, Commerce initiated an administrative review of sales during the period from January 11, 1995, through June 30, 1996. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation*, 61 Fed. Reg. 42,416 (Aug. 15, 1996). As part of its review, Commerce initiated a below-cost sales investigation to determine whether TPC had sold foreign like product at prices below the cost of production.

During the administrative review, Commerce determined that TPC did not sell a sufficient amount of foreign like product in Thailand and therefore based normal value on sales prices in Germany, TPC's largest third country market. *Canned Pineapple Fruit From Thailand; Preliminary Results and Partial Termination of Antidumping Duty Administrative Review*, 62 Fed. Reg. 42,487, 42,488 (Aug. 7, 1997) ("*Preliminary Results*"). Commerce found that TPC made third country sales of some CPF products at prices below the cost of production and therefore excluded those sales from its normal value determination. *Id.*, 62 Fed. Reg. at 42,491. For those products with no remaining third country sales, Commerce used constructed value as the basis for normal value. *Id.*

In determining the cost of production, Commerce calculated a single average cost for the entire period of review. During the comment period following the Preliminary Results, TPC argued that a single average cost of production distorted the price comparison between normal value and the United States sales price in two ways. *Notice of Final Results of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand*, 63 Fed. Reg. 7392, 7399 (Feb. 13, 1998) ("*Final Results*"). First, because the cost of fresh pineapple increased substantially during the period of review,[1] sales early in the period appeared to be below cost, while sales late in the period appeared to have high profit margins. Thus, TPC argued, Commerce should calculate separate costs of production for different fiscal years. Second, merchandise is held in inventory before sale,[2] so TPC argued that the assignment of fiscal year costs to sales should take into account the average inventory period. To enable that assignment, TPC had submitted cost data for 1994, which was prior to the period of review. Commerce responded that it departs from its normal methodology of calculating a single weighted average cost of production only "in unusual cases where there are substantial changes in cost, e.g., cases involving high-inflation economies." *Id.* Commerce found that the fluctuations in the cost of pineapple did not warrant special treatment. *Id.*, 63 Fed. Reg. at 7400.

TPC appealed to the Court of International Trade, challenging Commerce's calculation of a single average cost of production for the entire period of review. *Thai Pineapple Canning Indus. Corp. v. United States*, No. 98–03–00487, 1999 WL 288772 (Ct. Int'l Trade May 5, 1999) ("*TPC I*"). The Court of International Trade noted a number of cases in which Commerce had adjusted its methodology for changes in costs over the period of review or had matched costs to sales more accurately than in this case. Given the distortions in cost calculations caused by the price increase of fresh pineapple and the delay between production and sale of goods, the court remanded to Commerce with instructions to revisit the issue. *Id.* at *4. Specifically, the court directed Commerce to

> reanalyze the data to determine whether TPC has provided sufficient data to match costs to appropriate fiscal year sales. If it has, in the absence of any proper antidumping policy reason for not doing this seemingly minimally burdensome and substantially less distortive comparison, Commerce must proceed as it has in the past and match fiscal year costs with sales.

Id.

On remand, Commerce recalculated separate costs for the 1995 and 1996 fiscal years and then matched 1995 costs to 1995 sales and 1996 costs to 1996 sales. *Final Results of Redetermination Pursuant to Court Remand: Thai Pineapple Canning Industry Corp. v. United States*, No. 98–03–00487, slip op. at *11 (Sept. 2, 1999) (unpublished, filed with the Court of International Trade) ("*Remand Results*"). In response to comments from TPC that matching sales to costs in the same time period continued to produce distorted results, Commerce reiterated its general policy of using the cost of producing merchandise during the period of review rather than the cost of producing the merchandise sold during the period of review. *Id.* at *27. Commerce conceded that the statute,

[1] The Court of International Trade described the increase as "almost fifty percent." *Thai Pineapple Canning Indus. Corp. v. United States*, No. 98–03–00487, 1999 WL 288772, at *3 (Ct. Int'l Trade May 5, 1999) ("*TPC I*"). Commerce has not challenged that figure in this appeal. TPC's detailed calculations of increases in fresh pineapple costs are confidential and therefore omitted from this opinion. That information may be found in the confidential version of *TPC I*, No. 98–03–00487, slip. op. at 6–7, n.4.

[2] The typical inventory period of TPC's merchandise prior to sale is confidential and therefore omitted from this opinion. That information may be found in the confidential version of *TPC I*, slip. op. at 8, n.5.

which provides that costs are determined "during a period which would ordinarily permit the production of [the merchandise] in the ordinary course of business," 19 U.S.C. §§ 1677b(b)(3)(A), 1677b(e)(1), is broad enough to allow for either approach. Nevertheless, Commerce stated that it will not stray from its normal practice except in cases with unique circumstances, which it maintained are not present in this case. *Remand Results* at *27–28.

TPC appealed again to the Court of International Trade, which this time agreed with Commerce. *Thai Pineapple Canning Indus. Corp. v. United States*, No. 98–03–00487, 2000 WL 174986, at *3–5 (Ct. Int'l Trade Feb. 10, 2000) ("*TPC II*"). The court concluded that the use of separate 1995 and 1996 costs sufficiently accounted for the rising pineapple costs and complied with its remand instruction, and the court determined that the facts of this case did not warrant further modification of Commerce's methodology. *Id.* at *5. TPC appeals that decision to this court.

II.

Once Commerce makes a preliminary determination that merchandise is being sold in the United States at less than fair value, Commerce orders the posting of a cash deposit or bond for each entry of merchandise at a rate based on the preliminary estimated dumping margin. 19 U.S.C. § 1673b(d)(1)(B) (1994). After Commerce makes a final determination that the subject merchandise is being sold at less than fair value, *id.* § 1673d(a), and the International Trade Commission makes a final determination that an industry is materially injured, *id.* § 1673d(b), Commerce publishes an antidumping order with a new assessment rate based on the dumping margin determined during Commerce's investigation. *Id.* § 1673e(a). For entries of merchandise after Commerce's affirmative preliminary determination and before the Commission's affirmative injury determination, if the deposit of estimated duty under § 1673b(d)(1)(B) is higher than the duty under the antidumping order, the difference is refunded. 19 U.S.C. § 1673f(a) (Supp. V 1999). On the other hand, if the deposit is lower than the duty under the order, the difference is disregarded. *Id.* That is, the preliminary estimated duty acts as a "cap" on the duty that can be collected for entries made between the date of Commerce's preliminary determination and the date of the Commission's injury determination, often referred to as the "cap period."

In the case at hand, the cap period ran from January 11, 1995 to July 19, 1995. The period of review for Commerce's administrative review included the cap period and continued until June 30, 1996. In its administrative review, Commerce considered all sales made during the period of review and calculated a single assessment rate for the entire period of review. TPC challenged that determination, arguing that Commerce was required to compute two separate assessment rates, one based on sales during the cap period, and the other based on sales during the remainder of the period of review. *TPC I*, 1999 WL 288772, at *9–10. The

Court of International Trade affirmed Commerce's methodology, noting that the cap is a limitation on collection during the cap period, unrelated to the determination of an antidumping duty in an administrative review pursuant to 19 U.S.C. § 1675(a). *Id.* at *10. TPC appeals that decision to this court.

DISCUSSION

I.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(5) (1994). We review antidumping determinations made by Commerce by applying anew the standard of review applied by the Court of International Trade. *Inland Steel Indus. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999). Accordingly, we will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

The Government argues that the methodology used by Commerce should receive deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001), a decision issued after briefing and oral argument in this case, the Supreme Court made it clear that an agency's statutory interpretations are due *Chevron* deference when articulated in "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement" having the force of law. 121 S. Ct. at 2172. We have subsequently held that statutory interpretations articulated by Commerce in antidumping determinations qualify for *Chevron* deference. *Pesquera Mares Australes v. United States*, 266 F.3d 1372, 1379–82 (Fed. Cir. 2001). Whether Commerce is entitled to *Chevron* deference or review under the less deferential regime set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is of no moment to this case, however. Under either, if the Government's position is unreasonable, deference does the agency no good.

II.

The first issue before us is whether, on the facts of this case, Commerce is required to modify its methodology for matching costs to sales in its determination of dumping margins when the cost of the main raw ingredient, fresh pineapple, increased by a substantial amount before and during the period of review, and when the merchandise was held in inventory for a period of time before sale. Commerce has already revised its methodology once as instructed by the Court of International Trade in *TPC I*, dividing the period of review into two periods for purposes of calculating costs of production instead of computing a single average cost for the entire period of review. This change addressed the first problem presented by TPC—the increase in the cost of fresh pineapple during the period of review. TPC alleges that its dumping margins will continue to be distorted unless Commerce addresses the second problem—the delay between production and sale while merchandise remains in inventory.

TPC urges that the statutory language itself requires Commerce to match sales with costs calculated for a period during which the merchandise sold was actually produced, thus taking into account the inventory time. Cost of production is defined by statute as "the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, *during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business*," plus additional overhead and incidental expenses. 19 U.S.C. § 1677b(b)(3) (emphasis added). The definition of constructed value contains similar language, the word "merchandise" replacing "foreign like product." *Id.* § 1677b(e). In TPC's view, the only period of time that would "ordinarily permit" production is the period during which the imported goods under consideration were actually produced.

We do not read the statutory language as specifying the period to be used when determining costs, and no other statute or regulation provides further guidance. Moreover, the statute does not dictate the methodology for calculating cost of production and constructed value or for matching those costs against sales. Because we conclude that the statute does not clearly decide the matter, our next task is to determine whether Commerce's methodology is a reasonable interpretation of the statute. (No one questions Commerce's delegated authority to interpret the statute in the first instance.)

Under its standard methodology, Commerce determines cost of production by calculating a single weighted-average cost for the period of review. *Final Results*, 63 Fed. Reg. at 7399. Believing that the cost structure in place during the period of review is usually adequate for calculating the cost of production in the ordinary course of business, Commerce purports to depart from its standard methodology only in "certain rare situations where cost and price averages calculated over the entire period [do] not permit an appropriate comparison." *Id.* Nevertheless, TPC and the Court of International Trade have identified numerous cases in which Commerce adjusted its methodology in order to better match costs with prices.

One adjustment made by Commerce is the use of shorter cost reporting periods when, for example, prices have moved significantly during the period of review. *See, e.g.*, *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors From Taiwan*, 62 Fed. Reg. 51,422, 51,424 (Oct. 1, 1997) (using quarterly cost periods when sales prices declined significantly). TPC received the benefit of such an adjustment when Commerce calculated costs for separate fiscal years after remand from the Court of International Trade. Another adjustment is the lagging of costs when there is a delay between production and sales of goods in order to capture the actual costs of reported sales. *See, e.g.*, *Final Determination of Sales at Less Than Fair Value:*

Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea, 58 Fed. Reg. 15,467, 15,473 (Mar. 23, 1993) ("*DRAMs from Korea*") (lagging costs for the length of time it takes for assembly and test and for average inventory holding periods when prices were declining); *Fresh and Chilled Atlantic Salmon From Norway; Final Results of Antidumping Review*, 58 Fed. Reg. 37,912, 37,912–13 (July 14, 1993) ("*Salmon from Norway*") (matching sales to actual costs incurred before the period of review because growth cycle of salmon was 18–24 months); *Final Determination of Sales at Less Than Fair Value; Sweaters Wholly or in Chief Weight of Man-Made Fiber From Taiwan*, 55 Fed. Reg. 34,585, 34,596 (Aug. 23, 1990) ("*Sweaters from Taiwan*") (using actual costs incurred for each production run).

Commerce asserts that the language of 19 U.S.C. §§ 1677b(b)(3) and 1677b(e) is broad enough to allow its standard methodology of computing a single weighted-average cost for the period of review or any other methodology adjusted to better match costs with sales, including the use of the cost of the actual merchandise sold during the period of review. While we agree that the statutory language leaves room for some discretion by Commerce in determining the cost period, the standard methodology may not be permissible in all scenarios because Commerce has recognized that certain circumstances warrant exceptions. The question we must answer is whether Commerce's application of its standard methodology to this case, modified by the use of two cost periods but not matching actual costs to sales, falls within the range of permissible construction of the statute.

This case includes two elements not present in most antidumping determinations: a dramatic change in the cost of the product's main raw input, and a significant delay between production and sale of the product. These two factors together operate to distort the calculation of dumping margins. Splitting the period of review into two cost periods has eliminated some of the distortion caused by the increase in pineapple costs, but the problem can be remedied only by using the cost of actual merchandise sold during the period of review, even though it requires the use of costs outside the period of review. While factual distinctions between cases can almost always be found, this case is no different in principle from cases in which Commerce has modified its approach. Salmon and sweaters may have their peculiar characteristics, yet one of the reasons given for using actual costs in *Salmon from Norway* is similar to this case—the fluctuation of costs during the period of review. 58 Fed. Reg. at 37,913. Most compelling is *DRAMs from Taiwan*, in which Commerce lagged costs to account for inventory periods—essentially what TPC has requested in this case. *See* 58 Fed. Reg. at 15,473. The decrease in sales price of the subject merchandise in *DRAMs* has an effect similar to the increase in cost in this case, and we see no basis for Commerce's disparate treatment of the two cases.

The statutory language regarding cost of production and constructed value gives Commerce some latitude in determining costs and using those costs to derive dumping margins. While various methodologies are permitted by the statute, it is possible for the application of a particular methodology to be unreasonable in a given case when a more accurate methodology is available and has been used in similar cases. That is the situation presented by this case. Because we conclude that Commerce's failure to account for inventory holding time during a period of rising costs is unreasonable in this case, we reverse the decision of the Court of International Trade sustaining the methodology used by Commerce to determine TPC's cost of production and constructed value. We remand to the Court of International Trade with instructions to require Commerce to match sales of goods to costs based on the period in which those goods were manufactured, taking into account the inventory period.

III.

During the administrative review, Commerce determined TPC's assessment rate by first determining the normal value and export price (or constructed export price) of each entry of the subject merchandise during the period of review and calculating the dumping margin for each entry in accordance with 19 U.S.C. § 1675(a)(2)(A). Commerce then calculated an average assessment rate for the entire period of review by dividing the dumping margin on the subject merchandise by the entered value of the merchandise, in accordance with Commerce's established practice at the time and a more recent regulation, 19 C.F.R. § 351.212 (2001). *Final Results*, 63 Fed. Reg. at 7393. TPC contends that the use of a single assessment rate for the entire period of review violates relevant statutory provisions and that Commerce is required to compute separate assessment rates for the cap period and the remainder of the period of review.

TPC's concern stems from the particular facts of this case. According to TPC, its highest dumping margins, as determined by the administrative review, occurred during the cap period, approximately the first third of the period of review. *Final Results*, 63 Fed. Reg. at 6393. Dumping margins of entries during the remainder of the period of review were lower. Thus, under Commerce's method of calculating a single assessment rate based on all dumping margins during the period of review, entries during the cap period contribute to a higher average assessment rate for the period of review. If Commerce calculated separate assessment rates based on entries during the cap period and those during the remainder of the period of review, as TPC advocates, the cap period would have an assessment rate higher than the average assessment rate calculated by Commerce, and the remainder of the period of review would have a lower assessment rate. But because the collected duty is capped in accordance with 19 U.S.C. § 1673f(a) at a very low rate for entries during the cap period, TPC's overall assessment would decrease.

TPC contends that 19 U.S.C. §§ 1675(a)(2) and 1673f(a) read together require Commerce to compute two separate assessment rates. Under TPC's interpretation of those statutes, because § 1675(a)(2)(A) requires Commerce to determine the dumping margin *for each entry* during the cap period, it follows that Commerce is required to calculate the duty to be assessed on an entry-by-entry basis. Furthermore, § 1673f(a) instructs Commerce to disregard the difference between the duty for entries during the cap period and the estimated duties deposited on those entries. According to TPC, the only way to comply with both provisions is to determine two assessment rates—one for the cap period and one for the remainder of the period of review.

We disagree with TPC's reading of the statutes. While § 1675(a)(2) requires Commerce to determine dumping margins for each entry, there is no requirement that assessment rates or duties be determined for each individual entry. Commerce's method of calculating an average assessment rate for the entire period of review by dividing the dumping margins of all entries by the entered value of all entries complies with 19 U.S.C. § 1675(a)(2)(C), which requires only that the calculated dumping margins be the "basis for the assessment" of antidumping duties.

Furthermore, § 1673f(a) does not impact the review and determination of antidumping duties during an administrative review under § 1675(a)(2). Section 1673f(a) relates to the deposit of an estimated dumping duty, required under 19 U.S.C. § 1673b(d) as security after an affirmative preliminary determination by Commerce. When an exporter deposits an estimated duty for entries during an investigation, the cap provision prohibits the collection of the difference between the duty determined by the investigation and the deposited amount. *See Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1098–99 (Fed. Cir. 1996) (discussing compliance with GATT limitation on collection of difference between posted security and final duty). Section 1673f(a) does not affect the duty for entries during the cap period; it simply limits the amount of that duty that can be collected. Thus, when Commerce determines a new duty as the result of an administrative review that is higher than the deposit of the estimated duty, the difference cannot be collected, and the duty for entries during the cap period is still capped in compliance with § 1673f(a).

Accordingly, we affirm the Court of International Trade's decision that Commerce's use of one assessment rate comports with the relevant statutes. We also reject, as did the Court of International Trade, TPC's alternative argument that Commerce should calculate different assessment rates for its two affiliates. Because most of one affiliate's sales occurred during the cap period and most of the other's sales occurred during the post-cap period, TPC's argument is essentially another attempt to obtain different assessment rates for the cap period and the post-cap period.

CONCLUSION

We affirm the judgment of the Court of International Trade upholding Commerce's determination of a single assessment rate for the entire period of review. Because we conclude that Commerce's failure to modify its methodology for matching costs to sales in this case is unreasonable, and thus not within the range of permissible interpretation of the statute, we reverse the judgment of the Court of International Trade upholding Commerce's methodology and remand with instructions to remand to Commerce for further proceedings consistent with this opinion.

COSTS

Each party shall bear its own costs.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED.

MITSUBISHI HEAVY INDUSTRIES, LTD., PLAINTIFF, AND TOKYO KIKAI SEISAKUSHO, LTD., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE, AND GOSS GRAPHICS SYSTEMS, INC., DEFENDANT-APPELLEE

Appeal No. 01–1017

(Decided December 28, 2001)

Yoshihiro Saito, Perkins Coie LLP, of Washington, DC, argued for plaintiff-appellant Tokyo Kikai Seisakusho, Ltd. With him on the brief were *Mark T. Wasden*, and *Alyssa Chumnanvech*.

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Appealed from: United States Court of International Trade
Judge DONALD C. POGUE

Before MAYER, *Chief Judge*, NEWMAN and CLEVENGER, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

In the latest chapter in this long-running battle over the United States Department of Commerce's assessment of antidumping duties against Mitsubishi Heavy Industries ("MHI") and Tokyo Kikai Seisakusho ("TKS") for their United States sales of large newspaper printing presses ("LNPPs"), TKS appeals from the final judgment of the Court of International Trade affirming the dumping determination. On appeal, TKS contests the Department of Commerce's determination that Japanese market LNPPs are a foreign like product under 19 U.S.C. § 1677b(e)(2)(A). Because we conclude that the Department of Commerce's determination was supported by substantial evidence, and because TKS's allegations regarding the agency's statutory construction are not properly before us, we affirm.

I

BACKGROUND

This case involves large newspaper printing presses exported to the United States from Japan. Although all LNPPs have similar design and function, individual LNPPs are custom-made per the customer's specification. The companies provide their customers with a menu of various components that can be built into the machine, and the customer decides what components to order. As a result, individual orders for LNPPs can vary to a greater or lesser extent, depending on what components the customer chooses. Because Japanese and United States newspapers have somewhat different characteristics in terms of size, use of color, etc., the LNPPs used to produce them also have somewhat different components. Thus, every contract for sale of an LNPP contains different terms—including price terms—because the LNPPs themselves have different components from contract to contract.

Upon a petition by Rockwell Graphics Systems, Inc., a U.S. competitor now known as Goss Graphics Systems, Inc. ("Goss"), the Department of Commerce ("Commerce") launched an antidumping investigation of two manufacturers, MHI and TKS. In due course, Commerce issued its final antidumping determination finding sales at less than fair value and announcing a dumping margin of 56.28 percent for TKS, the appellant here. *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg. 38,139 (Dep't Commerce, July 23, 1996) ("*Japan Final*"), *amended by* 61 Fed. Reg. 46,621 (Dep't Commerce, Sept. 4, 1996) (antidumping duty order and amendment to final determination). In *Japan Final*, Commerce used constructed value ("CV") to calculate the dumping margin, *see Japan Final*, 61 Fed. Reg. at 38,140, and it used home market (*i.e.*, Japanese) LNPPs as the foreign like product in its determination of profit, which is one component of CV, *see* 19 U.S.C. § 1677b(e)(2) (1994), despite having earlier found that direct price-to-price comparisons with home market LNPPs were impracticable as a basis for normal value—a finding that led to its original decision to use CV as a basis for normal value.[3] *See Japan Final*, 61 Fed. Reg. at 38,146.

TKS and MHI appealed numerous aspects of Commerce's determination in *Japan Final*, including its foreign like product determination. *See Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 810, 828 (Ct. Int'l Trade 1988) (*Mitsubishi I*). TKS, in particular, argued that Commerce's reliance upon 19 U.S.C. § 1677b(e)(2)(A) to calculate profit was inappropriate because "the findings that led Commerce to rely on CV rather than home-market sales in calculating normal value

[1] In order to make a dumping determination, Commerce must compare the export price to the goods' normal value. 19 U.S.C. § 1677b(a) (1994). The dumping margin is the amount by which normal value exceeds the price charged in the United States. Normal value is either the goods' price in the home market or its export price to countries other than the United States. *Id.* § 1677b(a)(1). When Commerce cannot determine the home market price, it may base normal value on CV. *Id.* § 1677b(a)(4).

constitute[d] evidence that no foreign like product exist[ed] in the home market." *Mitsubishi I*, 15 F. Supp. 2d at 828–29. The profit calculation under § 1677b(e)(2)(A) relies upon sales of "a foreign like product." 19 U.S.C. § 1677b(e)(2)(A) (1994). Because Commerce did not describe adequately its profit calculation so as to permit judicial review, the Court of International Trade remanded the case to Commerce to explain upon which of the three statutory definitions of foreign like product it relied to make its profit calculation. *Mitsubishi I*, 15 F. Supp. 2d at 829. In its remand determination, Commerce explained that it had relied upon the definition of foreign like product in 19 U.S.C. § 1677(16)(C), which requires, *inter alia*, that the foreign like product be merchandise that "the administering authority determines may reasonably be compared with" the exported merchandise subject to the investigation. 19 U.S.C. § 1677(16)(C)(iii) (1994).

TKS and MHI appealed the remand determination, and the Court of International Trade remanded again, this time because Commerce failed to explain the factual basis for its determination that the LNPPs sold in Japan and the United States could "reasonably be compared" as required by 19 U.S.C. § 1677(16)(C)(iii). *Mitsubishi Heavy Indus., Ltd. v. United States*, 54 F. Supp. 2d 1183, 1197 (Ct. Int'l Trade 1999) (*Mitsubishi II*). The Court of International Trade was troubled because in its first remand determination, Commerce made statements that made it appear that it had previously conducted a difmer analysis[4] and concluded that the home market and export LNPPs could not reasonably be compared. *See id.* at 1197. In its second remand determination, Commerce clarified that it had not conducted a difmer analysis. *Second Remand Determination* at 2–3. In addition, Commerce explained the factual basis for its finding that the home-market LNPPs could "reasonably be compared" with their United States counterparts, which included the common use to which the products are put (*i.e.*, printing newspapers) and TKS's and MHI's responses to detailed questionnaires showing that the Japanese and United States LNPPs share the same set of detailed press characteristics. *Id.* at 11–12.

Based on Commerce's explanation of the factual basis underlying its comparability determination, the Court of International Trade affirmed the dumping determination. *Mitsubishi Heavy Indus., Ltd. v. United States*, 97 F. Supp. 2d 1203, 1209 (Ct. Int'l Trade 2000) (*Mitsubishi III*). The court denied TKS's motion for reconsideration, *Mitsubishi Heavy Indus., Ltd. v. United States*, 112 F. Supp. 2d 1170, 1175 (Ct. Int'l Trade 2000) (*Mitsubishi IV*), and this appeal by TKS followed. We exercise jurisdiction over this appeal from a final decision of the United States Court of International Trade pursuant to 28 U.S.C. § 1295(a)(5).

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[2] When the foreign merchandise is not identical to the exported goods, Commerce may conduct a "difmer" analysis, which "adjusts normal value for the 'difference in cost attributable to the difference in physical characteristics'—the difference in merchandise ('difmer') adjustment." *Mitsubishi Heavy Indus., Ltd. v. United States*, 97 F. Supp. 2d 1203, 1206 n.4 (Ct. Int'l Trade 2000). If the "difmer" exceeds 20 percent, Commerce will make a finding that the merchandise cannot be reasonably compared, unless it can otherwise justify the comparison. In other words, a >20% difmer finding creates a presumption of noncomparability. *Id.* Obviously the difmer analysis is conducted—if at all—prior to a decision to use CV, because the difmer adjustment is made to normal value, not CV.

II

A

We review a decision of the Court of International Trade evaluating an antidumping determination by Commerce by reapplying the statutory standard of review that the Court of International Trade applied in reviewing the administrative record. *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). We will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see Micron Tech.*, 117 F.3d at 1393.

On appeal, TKS primarily argues that Commerce's determination that home and United States market LNPPs may reasonably be compared is not supported by substantial evidence. We note that in pursuing this argument, TKS has chosen a course with a high barrier to reversal. The Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The conclusion reached by Commerce need not be the only one possible from the record, for "[e]ven if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence." *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Fed.Maritime Comm'n*, 383 U.S. 607, 620 (1966). After reviewing the record, we conclude that substantial evidence supports Commerce's determination that home-market LNPPs are a foreign like product.

In its second remand decision, Commerce clarified the evidence underlying its decision to use home-market LNPPs as the foreign like product, explaining that "TKS's home market LNPP may reasonably be compared to its sales of LNPP in the United States based on evidence that LNPP in both markets share detailed product characteristics." *Second Remand Determination* at 2. Commerce noted that its conclusion was further "supported by the common use—to produce newspapers—to which both home market and U.S. LNPP are employed." *Id.* at 11. During the investigation, both TKS and MHI responded to a questionnaire sent by Commerce asking them to identify both United States and home-market LNPPs using the same set of detailed press characteristics. *Id.* TKS's and MHI's responses to this questionnaire, which indicated that their United States and home-market LNPPs do in fact share a majority of the same—or highly similar—characteristics, provide the principal factual predicate for Commerce's finding. TKS argues that this evidence is "self-serving" because Commerce prepared the questionnaire itself, forcing TKS and MHI to describe their Japanese and United States products using the same characteristics. To the extent that TKS accuses Commerce of stacking the deck against them, its argument is not well taken. As the agency to which Congress delegated the authority to determine antidumping duties, Commerce is responsible for gathering information to make dumping determinations. Commerce uses the information it collects in order to reach its decision—in this case that the home-market and United States LNPPs are reasonably comparable. Although Commerce is an agent of the United States government, it nevertheless makes its dumping determination based on an impartial analysis of the evidence. Furthermore, administrative acts by Commerce enjoy a presumption of regularity that includes, in this case, impartiality in its decision-making process, and one seeking to rebut that presumption carries a heavy burden. *See Skinner v. United States*, 594 F.2d 824, 830 (Ct. Cl. 1979). There is no evidence to suggest that Commerce made up its mind in advance and cunningly planned its questionnaire to support its position.

MHI's and TKS's responses to Commerce's information-gathering request provide ample support for Commerce's finding.[3] First, the questionnaire responses confirm "that the LNPP sold in Japan and the LNPP sold in the United States share the detailed press characteristics that [Commerce] set out in its questionnaire." *Second Remand Determination* at 11. And within each characteristic, the responses indicated that the individual specifications for each press characteristic were also similar. Obviously, because the LNPPs are custom-made, each individual LNPP may contain a different mix of these common characteristics. However, it is apparent that they all reflect a choice from among similar characteristics. Based on the long list of shared features, Commerce could reasonably conclude that Japanese and United States LNPPs could reasonably be compared for calculating CV profit.

TKS retorts that whatever the value of the questionnaire, Commerce did not consider the whole record when making its comparability determination, because the weight of evidence points the other way. First, TKS notes that United States LNPPs often contained significantly more individual components than did their Japanese counterparts. However, because profit is calculated as a percentage of the sale price, the fact that Japanese LNPPs may have fewer components (and thus, perhaps, a lower overall price) is immaterial. The individual differences between the United States and Japanese models that TKS cites are significant (for example, the United States units use "tower printing units" instead of the "satellite printing units" and "spot color units" more prevalent in Japan). However, such differences are unavoidable in customized equipment. That a United States buyer chooses a somewhat different mix of components than does a Japanese one may preclude price-matching the two contracts, but it does not mean that the machines themselves may not reasonably be compared.

TKS also takes umbrage at Commerce's reference to the English-language and Japanese-language Spectrum product brochures that TKS submitted in response to Commerce's demand to provide all brochures

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[3] Because the parties have requested confidential treatment for the most salient examples of their questionnaire responses, of necessity we do not offer a detailed discussion of those responses in this opinion.

relating to the merchandise under investigation. Commerce cited the brochures as an example of an LNPP model—the Spectrum model—marketed in both the United States and Japan, and noted that the Japanese and English versions of the brochure were identical. TKS argues that this brochure does not show that all United States Spectrums have identical characteristics as their Japanese counterparts, and that Commerce erred in citing the brochures as evidence of comparability.[4] But this is simply another way of saying that the Spectrums, like all LNPPs, are custom-made. The critical point is, given that individual differences exist from order to order, can the custom-made merchandise from Japan and the United States be reasonably compared? Commerce, looking at a brochure offering identical menus of features to Japanese and United States purchasers, could reasonably conclude that one Spectrum LNPP described in the brochure would be reasonably—not perfectly, not identically, but reasonably—comparable to any other Spectrum model.

In short, TKS does not provide any compelling evidence to suggest that Commerce neglected its duty to base its decision on the whole record. To the extent that TKS urges that the evidence before Commerce could be open to multiple interpretations, its argument does not require, or even allow, reversal. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (noting that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938))). Obviously, TKS draws a different conclusion from the evidence of the variations between individual product specifications than did Commerce, but that cannot—and does not—mean that Commerce's interpretation should be overturned. Accordingly, we hold that substantial evidence supported Commerce's decision to treat Japanese market LNPPs as the foreign like product for its determination in this case.

B

This brings us to TKS's second ground for reversal, that Commerce's foreign like product determination was not in accordance with law because it applied an incorrect interpretation of the relevant statutory provision defining foreign like product.

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[4] TKS also argues in its brief that reliance on the similarities between the Japanese and English Spectrum brochures is improper because the English brochure is a mere translation of the Japanese brochure, "submitted as a requirement of the Department to translate all submitted documents into English." This argument is particularly disingenuous in light of statements made by TKS to Commerce during the investigation. TKS submitted the brochures in response to Commerce's request to "[p]rovide all catalogs and brochures issued by your firm and affiliates that include the merchandise under investigation sold by your firm in the United States and in the comparison market. If translating the comparison market catalogs and brochures is burdensome, contact the official in charge." TKS produced the English brochure and the Japanese brochure in response to this request, because, in TKS's own words, the brochures described "merchandise under investigation that are sold by TKS in the United States and Japan * * *." TKS further explained that "[w]hile TKS has included copies of its Japanese brochures in their original language, TKS believes that they are essentially identical for purposes of this investigation to the English versions of the brochures that are being produced and, as a result, that it is not necessary to translate such brochures from Japanese into English." In other words, TKS's response demonstrates that the English brochures were independently responsive to Commerce's brochure request and were not mere translations of the Japanese brochures, although the similarities between the two brochures fortuitously saved TKS from the burden of translating its Japanese brochure.

The Tariff Act provides three definitions of foreign like product. *See* 19 U.S.C. § 1677(16)(A)–(C) (1994 and Supp. V 1999). Commerce relied upon the third and broadest of the three possibilities. The Act provides in relevant part that a foreign like product is "[m]erchandise—(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise, (ii) like that merchandise in the purposes for which used, and (iii) which the administering authority determines *may reasonably be compared* with that merchandise." *Id.* § 1677(16)(C) (emphasis added). Commerce concluded that TKS's and MHI's home market LNPPs meet this definition, including the requirement that they "may reasonably be compared" with the United States merchandise. TKS has consistently argued that its home market LNPPs may not be reasonably compared with its exports to the United States, and it continues to press that argument on appeal. As discussed above, we reject the first component of this argument, *i.e.*, that Commerce's determination is not supported by substantial evidence, and we now proceed to the second component, which involves Commerce's interpretation of the reasonable comparability prong of the foreign like product definition. In its second remand determination, Commerce opined that the reasonable comparability prong "must be interpreted based on context of the statutory provision to which the phrase is being applied." *Second Remand Determination* at 5. On appeal, TKS contends that this interpretation improperly varies depending upon the subsection of the statute to which the foreign like product determination is applied, and that Commerce's incorrect construction of the statute requires reversal of its foreign like product determination.

To understand the basis for TKS's allegation, it is necessary to describe the context in which Commerce articulated its flexible construction of the statute. In *Mitsubishi II*, the Court of International Trade directed Commerce to explain the factual basis for its determination that home market LNPPs could "reasonably be compared" with the subject LNPPs. *Mitsubishi II*, 54 F. Supp. 2d at 1197. This order was necessary because Commerce made ambiguous statements in its background section that suggested, in the Court of International Trade's view, that Commerce made a final difmer determination of >20%, giving rise to a presumption that the home market was not reasonably comparable to the exported LNPPs. *Id.* This presumption, if Commerce made it, would be inconsistent with finding the home market to be reasonably comparable for purposes of making a foreign like product determination. The Court of International Trade realized that the >20% difmer policy is only a guideline, but stated that after finding a difmer of over 20 percent, Commerce must affirmatively demonstrate why the merchandise is nevertheless reasonably comparable. *Id.* at 1196. This Commerce failed to do, necessitating a remand.

On remand, Commerce responded to the Court of International Trade's order by explaining that it never conducted a difmer analysis, and thus never made a presumptive finding of noncomparability. *Sec-*

ond Remand Determination at 4. The reference to the difmer analysis in its first remand determination, explained Commerce, was purely background information—an assertion supported both from its context and from its location in the "Background" section of the first remand determination. *See First Remand Determination* at 15. But after providing this explanation, Commerce engaged in a lengthy, and seemingly unnecessary, discussion of why it was appropriate to construe the statutory term "may reasonably be compared" differently depending on the context in which the definition of foreign like product will be applied. The discussion of the flexible construction was unnecessary because, as discussed below, Commerce never used differing meanings of the reasonable comparability prong in this investigation. Nevertheless, TKS's challenge to the legal underpinnings of Commerce's foreign like product determination springs from Commerce's articulation of this somewhat novel interpretation of the statute.

The Court of International Trade expressed concern with Commerce's statutory construction, but ultimately declined to reach the issue because it concluded that regardless of Commerce's proposed construction, "it was apparent that Commerce had not in fact applied the reasonable comparability prong inconsistently in its investigation of Japanese LNPPs. Therefore, the issue was not directly before us." *Mitsubishi IV,* 112 F. Supp. 2d at 1174. We agree with the Court of International Trade that the statutory construction issue is not ripe for decision, because TKS does not present, and our independent review does not reveal, any evidence of an inconsistent application of the statute in the case now on appeal. Instead, TKS argues that when Commerce initially decided to use CV instead of price-to-price comparisons, it necessarily found that home market LNPPs were not reasonably comparable to the exported LNPPs. Then, goes the argument, Commerce reversed itself and found them comparable for purposes of its foreign like product determination. TKS accuses Commerce of using its "flexible" statutory construction to arrive at inconsistent foreign like product determinations in its CV profit determination and its decision memorandum adopting CV over price-to-price comparisons. Careful examination of the allegedly inconsistent uses reveals, however, that TKS is chasing a phantom inconsistency in this case.

Commerce explained its decision to use CV rather than price-to-price comparisons in its November 9, 1995, decision memorandum. Commerce began by noting that "[t]he issue of the usability of the foreign like product in determining normal value (NV) in this case is two-fold: (1) whether or not price-to-price comparisons based on disaggregation of contract prices are feasible; and (2) whether or not price-to-price comparisons are technically feasible." Throughout the decision memorandum, Commerce uses the term "foreign like product" to refer to LNPPs sold in the Japanese market. Indeed, it uses "home market" and "foreign like product" interchangeably in the decision memorandum. Thus, contrary to TKS's allegation, Commerce used home market LNPPs as the foreign like product both for purposes of its decision on price-to-price comparisons and for its CV profit determination. Far from demonstrating an allegedly improper inconsistency of application, the decision memorandum highlights a consistent use of the statute, because Commerce used the same Japanese LNPP foreign like product both to determine whether TKS's home market was viable and to calculate CV profit.

In the decision memorandum, Commerce proceeds to describe the statutory guidelines for determining normal value, as set forth in 19 U.S.C. § 1677b(a)(1). As noted by Commerce, this section "establishes general rules for determining when the Department may base normal value on home market sales in the exporting country," a determination Commerce calls the "viability test." Commerce found, and TKS concedes, that the home market was viable. But Commerce noted that "[c]onsistent with the new statute * * * and notwithstanding the results of the above-described 'viability test,' the Department may determine that home market sales are inappropriate as a basis for determining [normal value] if the particular market situation would not permit a proper comparison." Commerce devoted the rest of its decision memorandum to an analysis of the particular market situation with respect to LNPPs. It explained that many factors underlie the "particular market situation" decision, the most important of which are "(1) the unique demand pattern prevalent in each national market; (2) the unique technical specifications required for each customized product sold; and (3) the very low volume of individual LNPP sales in the normal business cycle." The problem with direct price-to-price comparisons was that because each LNPP is custom made, Commerce would have to deconstruct each contract into its component parts, conduct a difmer analysis for each part, and then perform the overall comparison. After an exhaustive analysis, Commerce concluded that even if deconstruction were feasible (which it doubted), the actual calculation "would become an analytical exercise equivalent to the use of constructed value." In other words, the number of individual difmer adjustments that would be required for actual price-to-price comparisons was great enough that it would be more efficient simply to use constructed value. Importantly, this does not mean that the home market cannot reasonably be compared to the exported goods—it simply means that any comparison should use CV rather than direct price-to-price comparisons of individual models.

TKS claims that in the decision memorandum Commerce concluded "that the LNPPs sold to the home market are not 'reasonably comparable' to the LNPPs sold to the United States for 'price comparison purposes.'" TKS's argument has no merit because it does not reflect what Commerce actually did. Commerce simply decided that the particular market conditions rendered price-to-price comparisons impracticable—nothing more. It certainly did not decide that the home market LNPPs, in general, could not be a foreign like product under the statute.

In light of what Commerce actually decided in its price-to-price comparison decision memorandum, it is apparent that its variable interpretation of the reasonably comparable prong is not squarely before us, because Commerce did not apply that prong inconsistently in this determination. In the decision memorandum on price-to-price comparisons, Commerce did not discuss specifically its application of the reasonably comparable prong, but it used home market LNPPs as the foreign like product for the viability test, just as it did for the CV profit calculations. Therefore, these two applications were consistent with one another. This view is borne out by Commerce's own rejection of TKS's "inconsistent application" argument in *Japan Final*. Commerce stated its position as follows:

> We disagree with TKS that there were no sales of the foreign like product in the home market during the [period of investigation.] TKS is incorrect to suppose that because we did not find home market sales which provided practicable price-to-price matches, no foreign like product existed. The foreign like product * * * (*i.e.* sales of LNPP in Japan) did exist, as revealed by our examination of LNPP equipment sold in the home market for purposes of the Department's home market viability test * * *. However, the degree of unique customization for customers made the difference-in-merchandise adjustment for product price matching potentially so complex that the use of CV provided a more reliable and administrable methodology for establishing NV.

Japan Final, 61 Fed. Reg. at 38,146. In other words, Commerce's own explanation in *Japan Final* reveals that it used the same foreign like product, Japanese LNPPs, both for CV profit and in its decision to use CV. Hence, no inconsistency has been presented to frame our review in this appeal.

Because Commerce did not apply its flexible statutory construction of the reasonable comparability prong in this determination, we decline to reach the issue of whether Commerce's interpretation is contrary to law. Furthermore, because Commerce did not apply inconsistent interpretations of the statute when determining TKS's antidumping duty, we reject TKS's statutory construction argument for reversal.

III

For the reasons stated above, the decision of the Court of International Trade affirming Commerce's assessment of antidumping duties is affirmed in all respects.

COSTS

No costs.

AFFIRMED

INTERNATIONAL LIGHT METALS, PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 00–1415

(Decided January 28, 2002)

Joseph B. Tompkins, Jr., Sidley & Austin, of Washington, DC, argued for plaintiff-appellee. With him on the brief were *Frank R. Volpe*, and *Rebecca K. Smith*. Of counsel on the brief was *Donald F. Beach*, of Falls Church, Virginia.

Mikki Graves Walser, Attorney, International Trade Field Office, of New York, New York, argued for defendant-appellant. With her on the brief was *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, Department of Justice, of Washington, DC. Of counsel were *John J. Mahon*, Attorney, International Trade Field Office, Department of Justice, of New York, New York; and *Beth C. Brotman*, Attorney, U.S. Customs Service, Office of Assistant Chief Counsel, of New York, New York.

Appealed from: United States Court of International Trade
Chief Judge GREGORY W. CARMAN

Before CLEVENGER, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

FRIEDMAN, *Senior Circuit Judge*.

As used in this Customs case, "drawback" refers to the refund of Customs duties when a product "of the same kind and quality" as the imported product is subsequently exported. Here the United States Customs Service ("Customs") first awarded the appellee, International Light Metals ("International"), drawback, but then rescinded its ruling and required International to refund the drawback it had received, based on Customs' determination that the exported product was not "of the same kind and quality" as the imported product. In the prior appeal in this case, we reversed the Court of International Trade's affirmance of that ruling, on the ground that it was based upon a misinterpretation of the governing statute. We remanded the case to that court for further proceedings consistent with our opinion. On the remand, the Court of International Trade directed Customs to pay International the amount of drawback Customs had required International to refund.

The government's appeal challenges that ruling. The government contends that instead of directing Customs to pay a specified amount of drawback, the Court of International Trade should have merely remanded to Customs for the latter to determine the drawback issue anew under this court's interpretation of the statute in the first appeal. We reject the government's contention, and therefore affirm.

I

A. Insofar as here pertinent, the drawback statute, 19 U.S.C. § 1313, provides:

> (a) Articles made from imported merchandise
> Upon the exportation * * * of articles manufactured or produced in the United States with the use of imported merchandise * * * the

> full amount of the duties paid upon the merchandise so used shall be refunded as drawback * * *.
>
> (b) Substitution for drawback purposes
>
> If imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles within a [three-year] period * * * there shall be allowed upon the exportation * * * of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported or destroyed articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported * * *.

In other words, drawback may be paid when a domestic product is substituted for the imported one, provided that the former is "of the same grade and quality" as the latter. The resulting authorization from Customs to obtain drawback often is called a "drawback contract."

To obtain drawback, a manufacturer must comply with Customs rules and regulations, one of which requires that "each manufacturer * * * shall apply for a specific drawback contract by submitting a drawback proposal." 19 C.F.R. § 191.21(a) (1994).

B. The detailed facts of this case are set forth in this court's opinion in the prior appeal. *See Int'l Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999). Only a brief summary is necessary here.

In 1985, International, which described itself as "a primary manufacturer of titanium products," submitted a drawback statement to Customs "to show that our manufacturing operations qualify for drawback" and to "request that the Customs Service authorize drawback on the basis of our statement." The drawback statement listed "Titanium Sponge, with a minimum titanium content of 99%" under both the "Imported Merchandise" and the "Domestic Merchandise of the Same Kind and Quality" categories. Customs approved this drawback statement, thereby creating a drawback contract authorizing International to claim drawback in accordance with the statement.

From 1985 to 1987, International filed twenty-four drawback claims, which Customs paid. After a 1988 audit of those claims under the drawback contract, in which Customs discovered that International had used titanium alloy scrap in addition to titanium sponge in its production process, the auditors concluded that International's substitution of titanium alloy scrap for the titanium sponge was improper under the drawback contract. They indicated, however, that the substitution "may be correctible by an amendment to the drawback contract."

International filed an amended drawback statement in which it added "Scrap made with the use of Titanium sponge containing at least 99.3% pure Titanium" to the category of "Domestic Merchandise of the Same Kind and Quality." Customs, however, rejected the proposed amended statement on the ground that titanium scrap was not "of the same grade and quality" as titanium sponge. It therefore allowed drawback only for the part of each claim attributable to titanium sponge and not to titanium alloy scrap, and demanded repayment of the difference—$477,639.73, together with interest, for a total of $554,439.91.

International made the repayment and filed suit in the Court of International Trade seeking recovery of that sum. That court granted summary judgment for the government, upholding Customs' ruling that the titanium sponge and scrap were not of the "same kind and quality." *Int'l Light Metals v. United States*, 24 F. Supp. 2d 271, 292 (Ct. Int'l Trade 1998).

On appeal, this court reversed. *Int'l Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999). The court stated:

> It is undisputed that the titanium in the scrap was identical to the titanium in the sponge that ILM imported. Accordingly, the titanium in the domestic scrap was "of the same kind and quality" as the titanium in the imported sponge. Second, there is no dispute as to the amount of titanium that was in the scrap. As a result, the amount of a drawback to which ILM would be entitled based upon the titanium in that scrap and the titanium in the imported sponge could be precisely determined.

Id. at 1366.

The court

> conclude[d] that ILM's proposal for a revised drawback contract was consistent with the requirements of 19 U.S.C. § 1313(b) because the titanium alloy scrap that ILM used in its manufacturing process contained titanium that was, in the words of the statute, "of the same kind and quality" as the titanium it imported. * * * Under these circumstances, ILM was entitled to a revised contract that would have permitted drawback based upon the 16 entries (claims) that were not covered by its original contract.

Id. at 1367. The court found it unnecessary to reach another contention of International "because we have concluded that summary judgment was improperly granted in favor of the government based upon an erroneous view of the requirements of the statute." *Id.* at n.15.

The opinion concluded: "[t]he judgment in favor of the United States is reversed, and the case is remanded for further proceedings consistent with this opinion." *Id.* at 1367.

Following our reversal, the Court of International Trade ordered the matter to be:

> remanded to the United States Customs Service for:
>
> > (1) approval of the revised drawback contract submitted by International Light Metals on June 19, 1989 as directed by the Federal Circuit; and
> >
> > (2) payment of the drawback refund owed International Light metals in the amount of $554,439.91, together with interest on that amount calculated from August 11, 1995 to the date of payment pursuant to 28 U.S.C. § 2644 (1994), as directed by the Federal Circuit.

II

The government does not challenge the Court of International Trade's order that Customs approve International's revised drawback contract. It contends, however, that the court improperly directed Customs to pay International the $554,439.91 of drawback Customs had required International to refund. According to the government, instead of deciding that issue itself, the Court of International Trade should have remanded for Customs to determine "how much, if any, drawback was due to" International.

The government invokes the settled principle of administrative law that "[w]hen an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and, after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.'" *NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. and Gen. Pipefitters, Local Union No. 638*, 429 U.S. 507, 522 n.9 (1977) (quoting *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32–33 (1901)). In determining whether and how that principle is to be applied, however, its purpose must always be kept in mind: it is designed to insure that the reviewing court does not intrude impermissibly on the authority of the administrative agency by itself taking action that implicates the agency's expertise and discretion. Whether the principle is to be applied necessarily turns upon the precise issues the reviewing court has decided and what questions remain for the agency to decide on remand.

Customs originally allowed and paid International drawback. The sole ground upon which it rescinded that decision and required International to refund the drawback was that titanium scrap was not a product "of the same grade and quality" as titanium sponge, so that International's use of the scrap in the exported product did not meet the statutory requirement for drawback covering substituted merchandise in 19 U.S.C. § 1313(b). As a result of that interpretation of the statute, Customs refused to approve International's revised drawback statement covering the use of titanium scrap in the exported product. That statutory interpretation also was the basis of the Court of International Trade's initial affirmance of Customs' decision.

The correctness of Customs' interpretation of § 1313(b) was the only issue before us in the prior appeal and the only issue we decided there. When we held that Customs had misinterpreted the statute, the result was to vitiate Customs' recapture of the drawback it had obtained pursuant to that statutory interpretation, and to recreate the situation as it had existed before the recapture. In other words, the situation was as if Customs had not rescinded its earlier approval of the drawback. The proper way to accomplish that result was to require Customs to repay to International the drawback it had allowed in the first instance, together with interest.

Such action by Customs did not require any exercise of the agency's discretion or expertise. It would be a simple ministerial act, and the Court of International Trade properly ordered Customs to make the repayment.

Nothing in our prior decision indicates, or even suggests, that we anticipated or intended that on remand Customs would reopen the matter to consider other possible flaws in International's drawback claims. We reject the government's contention that the Court of International Trade "committed reversible error when it ordered Customs to pay drawback to International without first affording Customs an opportunity to ascertain the facts necessary to determine how much, if any, drawback is attributable to International's substitution of scrap and sponge pursuant to the terms of the revised contract and applicable Customs regulations." The only issue litigated and decided in this case was the correctness of Customs' interpretation of the statute, upon which its denial of drawback rested. The Court of International Trade's direction that Customs repay to International the drawback it previously had required International to refund was a proper implementation of our decision rejecting Customs' interpretation of the statute.

CONCLUSION

The judgment of the Court of International Trade is

AFFIRMED.

INTERNATIONAL TRADING CO., PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 00–1577

(Decided March 1, 2002)

R. Brian Burke, Rode & Qualey, of New York, New York, argued for plaintiff-appellee. With him on the brief was *William J. Maloney.*

James A. Curley, Attorney, Civil Division, Commerical Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *Stuart E. Schiffer*, Deputy Assistant Attorney General; *David M. Cohen*, Director, Department of Justice, of Washington, DC; and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Of counsel on the brief were *Edward N. Maurer*, Attorney, Office of Assistant Chief Counsel, United States Customs Service, of New York, New York; and *Cindy G. Buys*, Attorney, Office of Chief Counsel for Import Administration, Department of Commerce, of Washington, DC.

Appealed from: United States Court of International Trade
Judge EVAN J. WALLACH

Before NEWMAN, RADER, and BRYSON, *Circuit Judges*.

BRYSON, *Circuit Judge*.

The government appeals from a decision of the United States Court of International Trade holding that the Customs Service did not liquidate particular entries within the statutorily allotted time, and that those entries therefore were deemed liquidated at the rate deposited by the importer. The government challenges the court's decision as to when the period for Customs to liquidate the entries began to run. We reject the government's arguments and affirm the trial court's judgment.

I

Between March 1993 and February 1994, the International Trading Company ("ITC") imported shop towels from a company in Bangladesh, Sonar Cotton Mills (Bangladesh) Ltd. At the time of entry into the United States, the towels were subject to an antidumping order that required a cash deposit of antidumping duties at the rate of 2.72%. In April 1994, the Department of Commerce published a notice in the Federal Register that it would conduct an administrative review of the antidumping duty order on shop towels from Bangladesh covering the period of March 1, 1993, to February 28, 1994. Liquidation of the entries falling within the scope of the review was suspended pursuant to 19 U.S.C. § 1673b(d).

On February 12, 1996, Commerce published the final results of the administrative review in the Federal Register. The final results announced an antidumping duty rate of 42.31% for Sonar's towels. The next day, Commerce sent an e-mail message to Customs. Referring to the Federal Register entry of the previous day, the message noted that the administrative review had been completed, but it advised Customs not to liquidate any entries covered by the review until it received liquidation instructions.

More than six months later, on August 29, 1996, Commerce sent another e-mail message to Customs. That message, which was designated "non-public," directed Customs to assess antidumping duties at the rate of 42.31% on imports of Sonar's towels and stated "these instructions constitute the immediate lifting of suspension of liquidation of entry summaries for the merchandise and period listed above."

Customs liquidated the entries in October of 1996 and assessed antidumping duties at the rate of 42.31% of the entered value. ITC filed a formal protest, arguing that the entries were deemed liquidated by operation of law under 19 U.S.C. § 1504(d) at the rate ITC asserted at the time of entry, *i.e.*, at the deposit rate of 2.72%, because Customs did not liquidate the entries within six months after receiving notice of the removal of suspension of liquidation. The protest was denied, and ITC's request for further administrative review was denied in a letter ruling by Customs.

ITC then filed this action in the Court of International Trade, contending that the entries should be deemed liquidated at the deposit rate. The court held that the statutory suspension of liquidation had been removed upon the publication of the final results of the administrative review in the Federal Register and that the e-mail message sent to Customs the following day provided notice to Customs that suspension had been lifted. Accordingly, the court concluded that Customs had failed to liquidate the entries within six months after receiving notice of the removal of suspension, as required by 19 U.S.C. § 1504(d). Because Customs had failed to liquidate the entries within the allotted period, the court held that the entries were deemed liquidated at the deposit rate. The government then took this appeal.

II

The statute that is the focus of this case, 19 U.S.C. § 1504(d) (Supp. V 1993), provides that when a suspension of liquidation required by statute or court order is removed,

> the Customs Service shall liquidate the entry * * * within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry * * * not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

That statute has subsequently been amended, but not in ways material to the issue in this case.[1] Because section 1504 provides that an entry will be deemed liquidated by operation of law if Customs does not liquidate the entry within six months of receiving notice from Commerce that the suspension has been removed, it is critical to determine what constitutes the act that effects the removal of suspension and what constitutes notice of the removal to Customs. Unfortunately, neither section 1504 nor any other statute or regulation defines those statutory terms. Like the trial court, we therefore look to the structure and purposes of the Tariff Act to give those terms meaning.

A

The trial court agreed with ITC that suspension of liquidation for the entries at issue in this case was removed when the final results of the administrative review were published in the Federal Register. The government disagrees and argues that the suspension of liquidation was not removed until after (1) the final results were published and (2) Commerce instructed Customs to liquidate the entries. We reject the government's argument and agree with the trial court that suspension was removed upon publication of the final results in the Federal Register.

The statutory scheme governing suspension of liquidation supports the trial court's conclusion that suspension of liquidation was removed when the final results of the administrative review were published in the Federal Register. Liquidation of a particular class of entries is suspended when Commerce publishes in the Federal Register an affirmative preliminary or final determination in an antidumping investigation covering those entries. *See* 19 U.S.C. §§ 1673b(d) (1988); 1673d(c)(1)(C) (1994). Liquidation is suspended in that setting because it is not possible, at that point, to determine what duties will be assessed against

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[1] Other portions of the antidumping law have also been amended. In this opinion, we refer to the pre-1994 versions of each of the pertinent sections of the Tariff Act, which govern this case.

those entries. It follows logically that suspension should be removed as soon as it is possible to determine the appropriate duties, which occurs when the antidumping duty order is issued or the final results of an administrative review are announced. The statutes providing for the publication of an antidumping duty order or the final results of an administrative review are consistent with that understanding. In the case of antidumping duty orders, the applicable statute provides that the order should set forth the antidumping duty rate and directs Customs officers to assess antidumping duties promptly against the entries that are subject to the order. 19 U.S.C. § 1673e(a) (1994). In the case of the published final results of an administrative review, the applicable statute provides that the final results should set forth the determination of antidumping duty rates that "shall be the basis for the assessment of antidumping duties" on the subject entries. 19 U.S.C. § 1675(a)(2) (1988). A fair construction of those statutes is that because they impose an obligation on Customs to liquidate the entries promptly after publication of the order in question, the suspension of liquidation is removed as of the time of the publication. Moreover, as the trial court noted, tying the removal of suspension to the issuance of an antidumping duty order or the final results in an administrative review has the virtue of parallelism with the mechanism by which suspension was initiated; thus, suspension is begun by publication of an announcement of the beginning of the antidumping investigation, and suspension is removed by the publication of the announcement of the conclusion of the investigation.

The legislative history of section 1504(d) also supports the trial court's conclusion that suspension of liquidation was removed upon publication of the final results in the Federal Register. Before section 1504 was enacted, there was no statutory restriction on the length of time Customs could take to liquidate an entry. *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993). "Customs could delay liquidation as long as it pleased, with or without giving notice." *Int'l Cargo & Surety Ins. Co. v. United States*, 779 F. Supp. 174, 177 (Ct. Int'l Trade 1991). In 1978, Congress enacted section 1504 to impose a four-year time limit for liquidation. The primary purpose of section 1504 was to "increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction." *Dal-Tile Corp. v. United States*, 829 F. Supp. 394, 399 (Ct. Int'l Trade 1993) (internal quotations and citation omitted).

In 1993, Congress amended section 1504(d). The amendment was designed in part to address an anomaly in the prior version of the statute, which made deemed liquidation available if suspension of liquidation were removed before the expiration of the maximum four-year period for liquidating entries, but not if suspension of liquidation were removed after the expiration of the four-year period. *See Dal-Tile*, 829 F. Supp. at 399–400. The amendment increased the period of time within which Customs could liquidate entries after removal of suspension of liquidation from 90 days to six months. In addition, however, the amendment made clear that deemed liquidation was the consequence of Customs' failure to liquidate within that six-month period. *See* H.R. Rep. No. 103–361 part I, at 139 (1993).

The government's position in this case would undermine one of the principal objectives of the 1993 amendments by giving the government the unilateral ability to extend the time for liquidating entries indefinitely. That is because under the government's theory the removal of suspension of liquidation would occur only when Commerce instructed Customs to liquidate the entries, an event that Commerce could postpone for any period of time after issuing the final results.

The government asserts that the publication of the final results of the administrative review in the Federal Register cannot be the act that removed the suspension of liquidation because Commerce had not necessarily finished its administrative review when those results were published. The trial court found no merit in that argument, nor do we. By regulation, Commerce was required, promptly after issuing the final results, to (1) "provide to parties to the proceeding which request disclosure a further explanation of the calculation methodology used in reaching the final results," 19 C.F.R. § 353.22(c)(9) (1993); and (2) "instruct the Customs Service to assess antidumping duties" on the merchandise entered during the period under review, 19 C.F.R. § 353.22(c)(10) (1993). If Commerce had not completed its administrative review at the time the final results were published in the Federal Register, it would not have been able to comply with its own regulations.

The government argues that because Customs acts in a ministerial capacity when liquidating antidumping duties, the suspension of liquidation cannot be removed until Customs has all the information it needs to perform its ministerial task, i.e., when Commerce gives Customs instructions regarding liquidation. While it is true that Customs merely follows Commerce's directions regarding the assessment of antidumping duties, that does not mean that the statutory removal of suspension of liquidation cannot occur until Customs gets liquidation instructions from Commerce. The statute contemplates that Commerce and Customs will cooperate to effectuate liquidation promptly after the publication of the final results of the administrative review. The statute thus quite reasonably imposes requirements of expedition on both Commerce and Customs. Contrary to the suggestion in the government's brief, there is nothing untoward about having the six-month period for liquidation run during the period between the time Commerce publishes the final results and the time Commerce directs Customs to liquidate the entries that are covered by those results.

The government makes the related argument that suspension of liquidation must continue beyond the date that the final results are published in order to allow time for aggrieved parties to request the correction of ministerial errors under 19 U.S.C. § 1675(h) and to seek judicial review under 19 U.S.C. § 1516a. That argument is a non sequitur.

Even under the government's proposed construction of section 1504(d), the time for correcting ministerial errors and seeking judicial review could be cut short if Commerce issued liquidation instructions at the time it published the final results and Customs promptly liquidated the subject entries based on those instructions. Thus, there is nothing about the government's proposed construction that would avoid the problem the government sees with the construction adopted by the trial court. By the same token, the trial court's construction does not force Commerce and Customs to act so quickly that importers will be deprived of their rights to seek correction of ministerial errors or judicial review of the final results. All that is required is that Commerce and Customs fulfill their respective obligations so that liquidation occurs within six months.

Finally, we take considerable comfort in the fact that our position is consistent with prior decisions of the Court of International Trade, the court that has expertise in addressing antidumping issues and deals on a daily basis with the practical aspects of trade practice. That court's decisions support the importer's position that suspension of liquidation was removed upon publication of the final results in the Federal Register. In *American Permac, Inc. v. United States*, 642 F. Supp. 1187 (Ct. Int'l Trade 1986), for example, the plaintiff claimed that entries should have been deemed liquidated four years after importation under 19 U.S.C. § 1504(d) (1982), even though liquidation was suspended at the time the four-year period ended. The court rejected that position, stating in the course of its analysis that "the statutorily required suspension of liquidation continued until [Commerce] published the final results of its review." 642 F. Supp. at 1197. The Court of International Trade has employed similar analysis in later cases. *See Am. Permac, Inc. v. United States*, 800 F. Supp. 952, 958 (Ct. Int'l Trade 1986), *aff'd*, 996 F.2d 1236 (Fed. Cir. May 12, 1993) (unpublished opinion); *Rheem Metalurgica S/A v. United States*, 951 F. Supp. 241, 248 (Ct. Int'l Trade 1996), *aff'd*, 160 F.3d 1357 (Fed. Cir. 1998).

The only contrary case cited by the government is *United States v. Jick (USA) Industries Corp.*, 27 F. Supp. 2d 199 (Ct. Int'l Trade 1998). In *Jick*, the court accepted the government's argument that the suspension of liquidation remained in effect until Commerce issued an unpublished e-mail instruction advising Customs that suspension had been lifted. 27 F. Supp. 2d at 201. The *Jick* court, however, observed that the importer had failed to cite any authority to support its argument on summary judgment that the suspension of liquidation was terminated upon publication of the final results in the Federal Register, and the court therefore drew an adverse inference on that issue against the importer. In this case, by contrast, the trial court noted that the importer had presented extensive and persuasive authority that suspension is removed upon publication of the final results, and for that reason declined to follow *Jick*. We agree with the trial court's analysis and hold that suspension of liquidation in this case was removed upon publication of the final results of the administrative review in the Federal Register.[2]

B

Even if suspension has been removed, section 1504(d) provides that the six-month period for deemed liquidation does not begin to run until Customs receives notice from Commerce that the suspension has been removed. The trial court found that publication of the final results in the Federal Register did not constitute notice to Customs that suspension had been removed but that the e-mail message sent to Customs the following day, February 13, 1996, did constitute such notice. On appeal, the government asserts that the February 13 e-mail message did not constitute notice within the meaning of section 1504(d) and that Customs did not receive such notice until it received specific instructions from Commerce to liquidate the entries, an event that according to the government did not occur until the non-public e-mail message of August 29, 1996. ITC, on the other hand, argues that publication by Commerce of the final results in the Federal Register constituted notice to Customs of the removal of suspension. Although the judgment in this case would be the same under either the trial court's construction of the statute or ITC's construction, we agree with ITC that publication of the final results in the Federal Register constitutes notice to Customs within the meaning of section 1504(d).

For some of the same reasons that publication of the final results removes the suspension of liquidation, publication also provides notice of the removal to Customs. Publication in the Federal Register is a familiar manner of providing notice to parties in antidumping proceedings. *See, e.g.*, 19 U.S.C. § 1673d(d) (1994) (requiring the International Trade Commission and Commerce to notify interested parties of their determinations by publication in the Federal Register); 19 U.S.C. § 1673e(c)(2)(A) (1994) (requiring Commerce to publish notice in the Federal Register if it decides to allow an importer to post a bond in lieu of the deposit of estimated antidumping duties); 19 U.S.C. § 1673e(c)(3) (1988) (requiring Commerce to publish notice in the Federal Register of the results of its determinations and to assess antidumping duties based on those published results); 19 U.S.C. § 1516a(a) (1994) (requiring parties who object to a Commission decision to act within 30 days after the date of publication of that decision in the Federal Register); 19 U.S.C. § 1516a(c)(1) (1994) (tying the date for liquidation of entries affected by a relevant court decision to the date that notice of that court decision is published in the Federal Register). It therefore seems reasonable that

[2] The government urges us not to follow the lead of the Court of International Trade but to defer to a series of Customs Service rulings, including the ruling in this case, in which Customs has stated its view that the six-month period of section 1504(d) is not triggered until Customs receives liquidation instructions from Commerce. As the Supreme Court recently explained in a closely analogous context, such rulings are not entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); instead, they are entitled to weight only to the extent that they are carefully considered, consistent, and persuasive. *Mead Corp. v. United States*, 121 S. Ct. 2164, 2171 (2001). The Customs rulings on which the government relies contain little legal analysis, and although they take a consistent legal position, we do not find that legal position persuasive. We therefore decline the government's invitation to defer to the position taken in Customs' rulings in this and other similar cases.

Congress intended for publication of the final results in the Federal Register to have some legal effect.

Moreover, the date of publication provides an unambiguous and public starting point for the six-month liquidation period, and it does not give the government the ability to postpone indefinitely the removal of suspension of liquidation (and thus the date by which liquidation must be completed) as would be the case if the six-month liquidation period did not begin to run until Commerce sent a message to Customs advising of the removal of suspension of liquidation. Beyond that, treating the date of notification as separate from the date of publication could lead to messy factual disputes about when Customs actually received notice of the removal of the suspension of liquidation. As in this case, the courts would be required to referee debates about what kind of communication from Commerce relating to the announcement of the final results constituted a qualifying "notice" of the removal of suspension. The government, for example, contends that "notice" of the removal of suspension requires that Commerce provide Customs with liquidation instructions before Customs can be deemed to have "notice" of the removal of suspension, even though the statute says nothing about liquidation instructions. Adopting that position would require the courts, after the fact, to examine informal and non-public communications between Commerce and Customs to determine whether and when those communications constituted "liquidation instructions."

The language of 19 U.S.C. §§ 1675(a)(1) and 1675(a)(2) also supports the construction that publication of the final results in the Federal Register constitutes notice to Customs of the removal of suspension of liquidation for the entries covered by that administrative review. Section 1675(a)(1) mandates publication of the final results and requires that Commerce include in those results "notice of any duty to be assessed." It is fair to conclude that "notice" of the duty to be assessed is notice both to the importer, which will have to pay the duty, and to Customs, which will have to impose it. If publication of the final results constitutes removal of the suspension of liquidation, as we have held, then "notice" of the duty to be paid is, in effect, notice of the removal of suspension. Section 1675(a)(2) buttresses that point by specifying that the notice published in the Federal Register "shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination * * *." Because Congress required Customs to base the amounts of the antidumping duty assessments on the contents of the final results as published in the Federal Register, it is fair to conclude that the publication of those final results constitutes notice to Customs of the removal of suspension and Customs' obligation to proceed to liquidate the entries on the terms set forth in the final results.

It is true, as the trial court pointed out, that the Tariff Act sometimes uses the term "notice" or "notify" and at other times specifies publication in the Federal Register. The trial court found that those different uses convey two different concepts and that if Congress had intended for

Customs to receive notice of the removal of suspension of liquidation simply by virtue of the publication of the final results in the Federal Register, it would have been unnecessary to include a notice requirement in section 1504(d).

While there is force to that point, we think it is a sufficient answer that section 1504(d) applies not only to the removal of suspension that occurs upon publication of the final results of an administrative review, but also to the removal of suspension in other contexts, including the removal of a court-ordered suspension of liquidation. In that setting, the removal of suspension occurs as the result of court action, not a Federal Register publication, and the required notice must be provided by a separate mechanism. For that reason, it makes sense for section 1504(d) to refer separately to the acts of removal of suspension of liquidation and notification of the removal. In the case of issuance of the final results of an administrative review, unlike the removal of a court-ordered suspension, the removal of suspension of liquidation is effected by Federal Register publication, an act that provides general notification to affected parties regarding the reported action. In that setting, there is no reason to interpret section 1504(d) to require that notice of the removal of suspension of liquidation be provided by a mechanism separate from the act that effects the removal of suspension.

Accordingly, we hold that suspension of liquidation was removed on February 12, 1996, when the final results of the administrative review were published in the Federal Register. We also hold that publication of the final results in the Federal Register constituted notice from Commerce to Customs that the suspension of liquidation on the subject entries had been removed. Customs did not liquidate the entries within six months of February 12, 1996, as required by section 1504(d). The entries were therefore properly treated as having been liquidated six months after February 12, 1996, at the 2.72% antidumping duty asserted at the time of entry by ITC.

AFFIRMED.

ROLLERBLADE, INC., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01–1049

(Decided March 5, 2002)

Steven P. Florsheim, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, New York, argued for plaintiff-appellant. With him on the brief was *Stacy L. Weinberg*.

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Appealed from: United States Court of International Trade
Judge DONALD C. POGUE

Before NEWMAN, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and RADER, *Circuit Judge*.

RADER, *Circuit Judge*.

Rollerblade, Inc. (Rollerblade) appeals from a summary judgment of the United States Court of International Trade affirming the United States Customs Service (Customs) classification of imported in-line roller skating protective gear under subheading 9506.99.6080 (99.6080) of the Harmonized Tariff Schedules of the United States (HTSUS)[*] *Rollerblade, Inc. v. United States*, 116 F. Supp. 2d 1247 (Ct. Int'l Trade 2000). Because Customs correctly classified the imports, this court affirms.

I.

The imports in this case are in-line roller skating protective gear, such as knee pads, elbow pads, and wrist guards. Customs classified the imported protective gear as residual "other" sports equipment under subheading 99.6080 of the HTSUS, which carries a duty rate of 4% *ad valorem*:

9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
* * * * * * *	
9506.99	Other
* * * * * * *	
9506.99.60	Other
* * * * * * *	
9506.99.6080	Other

[*] References to the HTSUS throughout this opinion are to the 11th Edition published in 1999. *See* The Harmonized Tariff Schedules of the United States (1999), U.S. Customs Serv., *available at http://www.customs.gov/download/htsusa/htsusa.pdf.*

Rollerblade appealed to the Court of International Trade, arguing that Customs should have classified the protective gear as "accessories" under subheading 9506.70.2090 ("70.2090"). HTSUS subheading 70.2090 carries a 0% duty rate:

9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
* * *	* * * *
9506.70	Ice skates and roller skates, including skating boots with skates attached; parts and accessories thereof:
9506.70.20	Roller skates and parts and accessories thereof
* * *	* * * *
9506.70.2090	Other

Rollerblade sought this "accessory" classification because the protective gear was designed, tested, manufactured and marketed solely for use with in-line roller skates. Because the protective gear bore no direct relationship to roller skates, the Government argued that the imports were not accessories to that defining article.

The Court of International Trade affirmed the Customs classification based primarily on its interpretation of the dictionary meaning of the term "accessory." *Rollerblade*, 116 F. Supp. 2d at 1253. According to the trial court, an accessory under subheading 70.2090 must be "of" or "to" the article (roller skates) listed in the heading, not "of" or "to" the activity (roller skating) for which the article is used. *Id.* The trial court found that the protective gear had a direct relationship to the activity of roller skating, but not to the HTSUS heading, namely roller skates. Hence, the trial court affirmed Custom's refusal to classify Rollerblade's protective gear under subheading 70.2090 as an "accessory" to roller skates. *Id.* at 1254–55. Moreover, on summary judgment, the Court of International Trade concluded that Customs properly classified the protective gear under the residual "other" [sports equipment] subheading 99.6080. *Id.* at 1257.

Rollerblade timely appealed to this court, which has exclusive appellate jurisdiction. 28 U.S.C. § 1295(a)(5) (1994). Rollerblade argues that the protective gear constitutes "parts" to the roller skates because it contributes to the safe and effective operation of the in-line roller skates.

II.

This court reviews summary judgment "for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist." *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539, 1543 (Fed. Cir. 1994) (quoting *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d

763, 767 (Fed. Cir. 1993)). In the context of this case, however, this court defers to the contested Customs classification. Although not entitled to *Chevron* deference (*see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)), a Customs classification receives some deference in accordance with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *United States v. Mead Corp.*, 533 U.S. 218 (2001). Furthermore, under 28 U.S.C. § 2639(a)(1), "a classification of merchandise by Customs is presumed to be correct." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). Thus, "the burden of proof is upon the party challenging the classification." *Mita Copystar Am.*, 21 F.3d at 1082 (citing *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984)).

Classification of goods under the HTSUS entails both ascertaining the proper meaning of specific terms in the tariff provision and determining whether the merchandise subject to tariffs comes within the description of those HTSUS terms. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). The meaning accorded HTSUS terms presents a question of law, which this court reviews without deference. *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001). When reviewing whether the imports fit within those terms, this court uses a clear error standard. *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997).

When the HTSUS does not define a tariff term, the term receives its "common and popular meaning." *E.M. Chems. v. United States*, 920 F.2d 910, 913 (Fed. Cir. 1990). This court presumes the common meaning of a term used in commerce to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To determine a term's common meaning, a court may consult "dictionaries, scientific authorities, and other reliable information sources." *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (CCPA 1982).

The General Rules of Interpretation (GRI) of the HTSUS govern the classification of goods within HTSUS. The GRI bases proper classification under HTSUS on the heading or subheading terms. GRI 1 provides: "[f]or legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." Similarly, GRI 6 states: "[C]lassification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related notes and, *mutatis mutandis*, to the above rules."

In this case, subheading 70.2090 recites *"[r]oller skates* and parts and accessories thereof" (emphasis added), and not "*roller skating* and accessories thereof." In other words, subheading 70.2090 refers to an article (roller skates), not to an activity (roller skating). The subheading also covers parts of that article, such as wheels or laces for the skates. Thus, the subheading language specifically addresses roller skates and their parts and accessories. The language does not embrace every accessory associated with the broader activity of roller skating.

Like the trial court, this court also observes that HTSUS offers no definition for the term "accessory." Thus, the trial court correctly consulted the common (dictionary) meaning of the term. *See E.M. Chems.*, 920 F.2d at 913. As the Court of International Trade found, dictionary definitions indicate that an "accessory" must bear a direct relationship to the primary article that it accessorizes. In this case, under subheading 70.2090, the article accessorized is roller skates, not the general activity of roller skating. Moreover, as found by the trial court, the protective gear lacks a direct relationship to the roller skates. The protective gear does not directly act on the roller skates at all. Unlike a roller skate part or accessory, the protective gear does not directly affect the skates' operation. Thus, based on the common meaning of "accessory" and the language of subheading 70.2090, this court sustains the trial court's conclusion that Rollerblade's imported protective gear is not a roller skate accessory.

Before the Court of International Trade, Rollerblade contended solely that their protective gear was an accessory to roller skates. Rollerblade now argues for the first time that the protective gear is, alternatively, "parts" of the roller skates. Rollerblade would classify the protective gear as roller skate parts because it contributes to the safe and effective operation of the skates and functions by design solely with the skates. Because the terms "parts" and "accessories" appear in the same phrase under subheading 70.2090, this court, in its discretion, entertains this new argument. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 605–06 (D.C. Cir. 1998).

A "part" is "an essential element or constituent; integral portion which can be separated, replaced, etc." *Webster's New World Dictionary* 984 (3d College Ed. 1988). Thus, based on the common meaning, the term "part," like the term "accessory," must have a direct relationship to the primary article, rather than to the general activity in which the primary article is used. Again, the protective gear in this case has a relationship to the activity of roller skating, and not directly to the roller skates.

In *Trans Atlantic Co. v. United States*, this court's predecessor held that brackets mounted on the door frame were parts of a door closer because they were necessary to the efficient operation of the door closer. 48 C.C.P.A. 30 (1960). Likewise, in *Gallagher & Ascher Co. v. United States*, our predecessor court noted the purpose of an auxiliary heater in an air cooled automobile: "[T]he auxiliary heater contributed to the safe and efficient operation of the Volkswagen in frigid temperatures in relation to comfort of its occupants and in aid of the indispensable safety factor of vision by assisting in the removal of ice from the windshield." 52 C.C.P.A. 11, 16 (1964). The *Gallagher* court then held: "When once attached to the automobile to which it was solely dedicated and in the manner disclosed, and in the performance of the function for which it was designed, [the auxiliary heater] became a part of the automobile within the purview of paragraph 369(c) of the Tariff Act of 1930, as modified." *Id.*

Unlike *Trans Atlantic* and *Gallagher*, however, Rollerblade's imported protective gear protects the wearer from injuries related to an activity using the article. The imports do not attach to or contact in any way the subheading article, namely roller skates. The imports are not necessary to make the skates themselves work (as were the door brackets), nor are they necessary to make the skates themselves work efficiently or safely (as was the auxiliary heater). At best, the protective gear adds to the comfort and convenience of the wearer while roller skating. Rollerblade attempts to analogize the protective gear to the auxiliary heater in *Gallagher*, which the court found to provide comfort for the automobile passengers. While the auxiliary heater did provide comfort for the passengers, the *Gallagher* court did not rely on that feature to determine the heater's relationship to the automobile. Rather, the court held that the auxiliary heater became a "part" when attached to the automobile to make the automobile itself safer by removing ice from the windshield. *Id.* Thus, *Trans Atlantic* and *Gallagher* do not apply to this case.

This court recently construed the term "parts" in another Customs classification case. In *Bauerhin Technologies, Ltd. Partnership v. United States*, this court affirmed the Court of International Trade's classification of imported cushioned inserts and canopies for child safety seats. 110 F.3d 774 (Fed. Cir. 1997). Although specially designed to fit the child safety seat, the imported insert facilitated an activity (napping) associated with the HTSUS article. For this reason, the import was not a part of the child safety seat. This court thus affirmed Customs' classification of the article as "bedding and similar furnishings." *Id.* at 778. With respect to the canopy, the court determined that it attached to the seat and was sold as a child safety seat "part." In other words, the canopy was marketed as an "attachment" to the child safety seat without any use or purpose independent of that child safety seat. *Id.* Accordingly, this court upheld the Court of International Trade's judgment that required classification of the canopies as "parts." *Id.* at 779.

In this case, however, the protective gear has more in common with the child safety seat inserts. Because in contact with the seat, the cushioned inserts might have had a better case for classification as a "part" than the protective gear in this case. The protective gear is not analogous to the canopy over the child safety seat at all. Unlike the canopy, these imports sell separately from the roller skates. Moreover, the protective gear does not contact the skates at all and does not act directly on the skates. In other words, the roller skates work in the same manner whether the skater wears the protective gear or not. Concurrent use of the protective gear with the roller skates no doubt reduces injuries to the skater from the activity of roller skating, but this observation does not make the protective gear "parts" of the roller skates.

After properly excluding subheading 70.2090 as an acceptable classification, Customs chose classification under subheading 99.6080, entitled "other" [sports equipment]. Without a specific provision for this merchandise, Customs correctly classified the merchandise under the most applicable residual basket subheading. *See EM Indus. v. United*

States, 999 F. Supp. 1473, 1480 n.9 (Ct. Int'l Trade 1998) ("'Basket' or residual provisions of HTSUS Headings * * * are intended as a broad catch-all to encompass the classification of articles for which there is not a more specifically applicable subheading."). In this case, the most applicable heading is 9506, entitled "[a]rticles and equipment for general physical exercise * * * gymnastics, athletics, other sports." Subheading 99.6080, entitled "[o]ther," is the so-called catch-all for this provision. The definition offered for "equipment" includes those articles that are necessary and specifically designed for use in athletics and other sports. Rollerblade's imported protective gear fits within this category because it is "equipment" specifically designed for use in the sport of roller skating.

In sum, the Court of International Trade did not err in its determination that Customs properly classified Rollerblade's imported protective gear under the residual subheading 99.6080.

COSTS

Each party shall bear its own costs.

AFFIRMED.

MEAD CORP., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 98–1569

(Decided March 8, 2002)

J. Peter Coll, Jr., Orrick, Herrington & Sutcliffe, LLP, of New York, New York, filed a brief on remand from the Supreme Court of the United States for plaintiff-appellant. With him on the brief was *Kristen Bancroft*. Of counsel on the brief was *Sidney H. Kuflik*, Lamb & Lerch, of New York, New York.

Amy M. Rubin, Attorney, Civil Division, International Trade Field Office, Department of Justice, of New York, New York, filed a brief on remand from the Supreme Court of the United States for defendant-appellee. With her on the brief was *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch Department of Justice, of Washington, DC. Of counsel on the brief was *Karen P. Binder*, Assistant Chief Counsel, U.S. Customs Service, of New York, New York. Of counsel were *William Kanter*, and *Bruce G. Forrest*, Attorneys, Appellate Staff, Civil Division, Department of Justice, of Washington, DC; and *Allan L. Martin*, Associate Chief Counsel, and *Lou Brenner*, Attorney, U.S. Customs Service, of Washington, DC; and *Edward N. Maurer*, Attorney, U.S. Customs Service, of New York, New York.

Terence P. Stewart, Stewart and Stewart, of Washington, DC; *David Serko*, Serko & Simon, LLP, of New York, New York; *Richard M. Belanger*, Powell, Goldstein, Frazer & Murphy, LLP, of Washington, DC; and *Peter Jay Baskin*, Sharretts, Paley, Carter & Blauvelt, P.C., of New York, New York, for amicus curiae Customs and International Trade Bar Association.

On remand from: The Supreme Court of the United States

Before NEWMAN, RADER, and SCHALL, *Circuit Judges*.

RADER, *Circuit Judge*.

This case is before this court on remand from the Supreme Court of the United States. *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164 (2001) (*Mead III*). In *Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999) (*Mead II*), this court reversed the Court of International Trade's affirmance of a tariff classification from the U.S. Customs Service (Customs). Customs had classified day planners imported by Mead Corporation (Mead) as bound diaries. In reversing the trial court, this court accorded no deference to the Customs classification. The Supreme Court vacated the judgment of this court in *Mead II* and remanded because this court did not accord deference to the classification under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944).

In reconsidering the merits, this court applies *Skidmore* deference to the classification ruling at issue. Because Customs' classification of Mead's day planners within subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States (HTSUS) does not persuade under the *Skidmore* standard, this court reverses.

I.

At issue are five models of Mead's day planners (model nos. 47192, 47062, 47124, 47104, and 47102). The day planners differ from each other only stylistically based on size (ranging from 7-1/2″ x 4-3/8″ to 12″ x 10-5/8″), outer jacket cover material, and type of closure. The basic model contains a calendar, a section for daily notes, a section for telephone numbers and addresses, and a notepad. The larger models contain the features of the basic model with additional items such as a daily planner section, plastic ruler, plastic pouch, credit card holder, and computer diskette holder. A loose-leaf ringed binder holds the contents of the day planner, except for the notepad, which fits into the rear flap of the day planner's outer cover.

In a January 11, 1993 ruling, Customs classified the subject planners as bound diaries under subheading 4820.10.20 (emphasis added):

4820	Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*, exercise books, blotting pads, binders (looseleaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for sample or for collections and book covers (including cover boards and book jackets) of paper or paperboard:
4820.10	Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*:
4820.10.20	*Diaries*, notebooks and address books, *bound*; memorandum pads, letter pads and similar articles

Customs' original 1993 ruling offered little explanation for classifying Mead's day planners as bound diaries. After Mead protested, Customs issued a new ruling on October 21, 1994, with more detailed reasoning about the classification under subheading 4820.10.20. This 1994 ruling is at issue in this case.

Moving for summary judgment in the trial court, Mead asserted both that its imports were not diaries and were not bound. Either contention, if accepted, compels classification under the "other" provision of subheading 4820.10.40. Under that subheading, Mead would owe no tariff on the imported articles, in contrast with the 4.0% tariff assessed in Customs' 1993 ruling. In support of its motion, Mead submitted dictionary definitions of the terms at issue, affidavits from seven individuals from the U.S. stationery goods industry, and affidavits from two bookbinding experts. The Government cross-moved for summary judgment in support of Customs' classification, offering its own definitions of "diary" and "bound," and submitting supporting affidavits.

In a July 14, 1998 opinion (No. 98–101), the trial court granted the Government's motion. The Court of International Trade broadly defined "diaries" as "articles whose principle purpose is to allow a person to make daily notations concerning events of importance." Under that definition, the trial court decided that Mead's day planners qualify as diaries even though they admittedly contain "supplementary material"—non-diary elements such as a section for addresses and telephone numbers. With respect to the term "bound," the trial court opined: "The common meaning of 'bound' is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging." The trial court thus found that Mead's day planners, whose contents fit in a loose-leaf ringed binder, fall within that broad definition of "bound."

Mead argued for a different definition of "diaries": "A book for recording a person's observations, thoughts and/or events." Mead further contended that "bound" applies only when pages are "permanently secured along one edge between covers in a manner traditionally performed by a bookbinder." Reversing the Court of International Trade, this court held that Mead's day planners were neither "diaries" nor "bound." *Mead II*, 185 F.3d at 1311. Thus, this court concluded that the day planners required classification under the "other" provision of subheading 4820.10.40. In reaching its conclusion, this court did not accord ordinary classification rulings the deference described in *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778 (1984).

The United States then petitioned for a writ of certiorari to the United States Supreme Court. The Supreme Court granted certiorari, 530 U.S. 1202 (2000), to determine "the limits of *Chevron* deference owed to administrative practice in applying a statute." *Mead III*, 533 U.S. at ____, 121 S. Ct. at 2171. The Court held that classification rulings, although "beyond the *Chevron* pale," may merit some deference under *Skidmore*. *Id.* at ____, 121 S. Ct. at 2167. The Court vacated and remanded the earlier judgment of this court with instructions to consider Customs' classification ruling under the principles in *Skidmore*. *Id.* at ____, 121 S. Ct. at 2177.

II.

This court reviews the Court of International Trade's grant of summary judgment without deference. *Sharp Microelectronics Tech., Inc. v. United States*, 122 F.3d 1446, 1449 (Fed. Cir. 1997). Where, as here, the parties do not dispute material facts regarding the imported goods, this court's review of the classification of the goods collapses into a determination of the proper meaning and scope of the HTSUS terms, which, as a matter of statutory interpretation, is a question of law. *See SGI, Inc. v. United States*, 122 F.3d 1468, 1471 (Fed. Cir. 1997).

In keeping with the Supreme Court's instructions in *Mead III*, this court affords a classification ruling deference in accordance with the principles set forth in *Skidmore*. *Mead III*, 533 U.S. at ____, 121 S. Ct. at 2167. Under *Skidmore*, a classification ruling receives a measure of deference proportional to its "power to persuade." *Id.*; *Skidmore*, 323 U.S. at 140. That power to persuade depends on the thoroughness evident in the classification ruling, the validity of its reasoning, its consistency with earlier and later pronouncements, the formality attendant the particular ruling,[1] and all those factors that give it power to persuade. *Mead III*, 533 U.S. at ____, 121 S. Ct. at 2167; *Skidmore*, 323 U.S. at 140. In addition, Customs' relative expertise in administering the tariff statute often lends further persuasiveness to a classification ruling, entitling the ruling to a greater measure of deference. While this court therefore recognizes its responsibility to accord a classification ruling the degree of deference commensurate with its power to persuade, this court also recognizes its independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms. *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001).

III.

This court construes a tariff term according to its common and commercial meanings, which it presumes are the same. *See Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To discern the common meaning of a tariff term, this court consults dictionaries, scientific authorities, and other reliable information sources. *See C. J. Tower & Sons of Buffalo, Inc. v. United States*, 673 F.2d 1268, 1271 (Fed. Cir. 1982).

A. DIARIES

Customs gleaned its broad meaning of diaries from three prior cases. In *Baumgarten v. United States*, 49 Cust. Ct. 275, Abstract No. 67150 (1962), the court considered a plastic-covered book, 4-1/4″ by 7-3/8″, having pages for addresses and telephone numbers followed by ruled pages allocated to the days of the year and the hours of the day. Calen-

[1] Certain rulings—specifically, those that have the "effect of changing a practice"—undergo notice-and-comment procedures. 19 C.F.R. § 177.10(c) (2001). This case does not involve such a ruling.

dars for the current and following months headed the ruled pages. The importer invoiced the articles as "desk-diaries." In classifying them as diaries rather than as "other blank books and slate books," the court looked first to the definition of a diary in *Webster's New International Dictionary of the English Language* (2d ed. 1951): "A register of daily events or transactions; a daily record; journal; esp., a book for personal notes or memoranda, or for details of experiences or observations of the writer; also, a blank book for daily memoranda." *Baumgarten*, 49 Cust. Ct. at 276. Based on this definition, the court decided:

> [T]he particular distinguishing feature of a diary is its suitability for the receipt of daily notations * * *. By virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose. That the daily events to be chronicled may also include scheduled appointments would not detract from their general character as appropriate volumes for the recording of daily memoranda.

Id.

In *Brooks Brothers v. United States*, 68 Cust. Ct. 91 (1972), the court considered an "Economist Diary," a 10″ by 8″ spiral bound article, covered in red leather, with fine plate-finish parchment. The importer did not dispute that the Diary featured pages suitable for use as a diary, but argued that the Diary also contained printed informational material such as maps and thus could not be classified as "Blank books, bound: Diaries." Discussing *Baumgarten*, the trial court noted: "Judicial authority, therefore, has adopted the crux of the lexicographic definitions that the 'particular distinguishing feature of a diary is its suitability for the receipt of daily notations.'" *Id.* at 97. The court concluded that although the informational pages added to the usefulness or value of the article, the diary portion of the Economist Diary, "clearly 'suitable for the receipt of daily notations,'" controlled the classification. *Id.* at 97–98.

Finally, in *Charles Scribner's Sons v. United States*, 6 CIT 168 (1983), the court classified an "Engagement Calendar," a 9-3/8″ by 6-1/2″ spiral bound article with photographs on the left side and a table of the days of the week on the right, as a calendar rather than a diary. It acknowledged the *Baumgarten* and *Brooks Brothers* cases, but decided that, in contrast to a diary that is "primarily intended to be used in connection with extensive notations," the article at issue was intended only "for a notation of no more than a sentence or two." *Id.* at 175.

Both Customs and the trial court relied heavily on these cases for their definition of diaries. These cases, however, involved classification of goods under tariff provisions different from the HTSUS at issue in this case. These prior cases therefore supply only limited guidance for this case. In *Charles Scribner's Sons*, for instance, the court decided between classifying the articles as calendars or diaries. Neither party in this case would classify the day planners as calendars. In *Baumgarten*, the court classified the articles at issue under the Tariff Act of 1930, which provided sparse guidance under Schedule 14 ("Papers and Books"):

Blank books and slate books:
  Address books, diaries, and notebooks
  Other

Likewise, the court in *Brooks Brothers* decided its case with similarly sparse guidance under the old Tariff Schedule of the United States (TSUS):

Schedule 2. Wood and Paper; Printed Matter
  Part 4. Paper, Paperboard, and Products Thereof
    Subpart C. Paper and Paperboard Cut to Size or Shape; Articles of Paper and Paperboard
      Blank books, bound:
        256.56 Diaries, notebooks, and address books
        256.58 Other

These earlier tariff schedules do not contain the specificity of the corresponding HTSUS headings. The more precise HTSUS classification scheme, which distinguishes diaries from articles similar to diaries, necessitates a more precise definition of the terms at issue. Stated another way, while the blunt dividing line in *Baumgarten* and *Brooks Brothers* distinguished diaries from other blank books, this court must distinguish diaries from account books, notebooks, receipt books, and other articles similar to diaries. Thus, this court must define and differentiate diaries with a finer point than those earlier cases.

The *Oxford English Dictionary*, at 612 (1989), defines a diary as: "1. A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observation." This definition largely comports with the definition cited in *Baumgarten* and with other dictionary definitions. The *American Heritage Dictionary of the English Language*, at 516 (3d ed. 1992), for example, defines a diary as: "1. A daily record, especially a personal record of events, experiences, and observations, a journal." *See also Webster's New Twentieth Century Dictionary of the English Language* at 504 (2d ed. 1961) ("1. a daily written record, especially of the writer's own experiences, thoughts, etc.").

These definitions reflect two key aspects of a diary. A diary provides space for a record, especially, as the Court of International Trade recognized, "concerning events of importance." Thus, a diary facilitates recording more than the mere date or time of events, but also more detailed observations, thoughts, or feelings about those events. This court, however, would not expand a diary record to embrace a broad range of writings embraced by the term "notations." To the contrary, the term "notations" encompasses the use of only a word or a brief phrase—writings too brief to include details about events, observations, thoughts, or feelings. To constitute a diary record at all, then, notations must be relatively extensive. In the words of *Charles Scribner's Sons*, a diary must have space for "more than a sentence or two." 6 CIT at 175.

In addition, a diary is a "record" in the sense that it "recalls or relates *past* events." *Webster's Ninth New Collegiate Dictionary* at 984 (1990) (emphasis added). A diarist records events, observations, feelings, or thoughts after they happen. A diary is retrospective, not prospective. A diary is not a place to jot down the date and time of a distant dentist appointment, regardless of whether that appointment would constitute an "event of importance."

Applying these aspects of the definition of a diary, the imports are articles similar to diaries (encompassed by "other" in subheading 4820.10.40), rather than diaries themselves under subheading 4820.10.20. With regard to the question of sufficient space to record detailed observations, this court notes that the Government's brief does not identify which part of the imports constitutes the diary portion. The record suggests that the trial court below focused on the "daily planner" section, which all five imported models have in common.[2] The daily planner section includes a series of pages allocated to days and numbered with the hours of the day along the left hand side of the page. Two blank lines (four shorter lines in the largest model) extend to the right of each hour. The very limited space provided by these blank lines would not permit a diarist to record detailed notations about events, observations, feelings, or thoughts. This limited space permits only the briefest notations. Space for only a word or phrase disqualifies these articles as diaries.

Moreover, an examination of the articles shows that the few lines for recording events does not envision recording of past events. The caption "Daily Planner" appears at the top of each page. The word "Appointments" appears above the blank lines. These pages facilitate advance planning and scheduling. As noted above, however, a diary is not a planning tool. Instead, a diary receives a retrospective record of events, observations, thoughts, or feelings. Mead markets its entire article as a "Day *Planner*," further buttressing the distinction between this prospective scheduling article and a diary. While the importer's marketing of the goods will not dictate the classification, such evidence is relevant to the determination and, in this case, weighs against classifying the articles as diaries. Indeed, the earlier trade cases—*Baumgarten* (desk-diaries); *Brooks Brothers* (Economist Diary); *Charles Scribner's Sons* (Engagement Calendar)—turned at least in part on the fact that the importers themselves regarded their articles either as diaries or as calendars. *See, e.g.*, *Brooks Brothers*, 68 Cust. Ct. at 98 ("[T]he Economist Diary is * * * by its own description a 'diary.'").

Thus, although mindful of Customs' relative expertise in classifying imported articles and its consistency in classifying day planners and other similar articles as bound diaries since 1993, this court concludes that Mead's imported day planners are not "diaries" (nor any form of a diary) within the meaning of subheading 4820.10.20. This conclusion

[2] To the extent the Government relies on any other portion of the day planners not discussed herein, this court has considered all sections and has determined that none qualify the article as a diary.

alone compels the classification of the subject articles under the "other" provision of subheading 4820.10.40.

B. BOUND

Reasoning that the tariff provisions at issue cover a "wide variety of book and non-book articles," the trial court eschewed the meaning of "bound" as used in the trade of book manufacturing. While heading 4820 covers book and non-book articles, the term "bound" does not appear in that heading. Rather, the term appears for the first time in subheading 4820.10.20 where it modifies "Diaries, notebooks and address books." These three items, the parties agree, are all books. Thus, the proper context to ascertain the meaning of "bound" is in the context of the manufacture of books. The trial court interpreted the term "bound" more broadly because it applied the term to non-book articles as well. In proper context, however, the HTSUS subheading uses "bound" in connection with types of books. Therefore, anchored to this correct context, this court seeks the meaning of that term.

The Dictionary of Publishing, at 43–44 (1982), defines the term "bound book" as: "Books that have been cased in, usually referring to books that have been sewn, glued, or stapled into permanent bindings." *Webster's Ninth New Collegiate Dictionary* defines "bound" as "4. *of a book*: secured to the covers by cords, tapes, or glue." These definitions within the proper context describe binding methods and materials as permanent. Thus, this court concludes that the term "bound," when used with reference to books as in subheading 4820.10.20, means permanently secured or fastened. In addition, affidavits from bookbinding and stationery goods experts in the record confirmed this meaning of the term "bound" in its proper context.

Customs' definition of "bound," in contrast, essentially disregards the bookbinder's meaning of the term. The HTSUS specifies a "bound diary." This specificity contemplates the existence of an "unbound diary." The Customs definition, however, would make the meaning of "bound" (fastened regardless of the permanency) so broad that it leaves no room for an "unbound diary." The Government argues that a stack of loose-leaf pages could constitute an unbound diary. While such a stack would certainly be unbound, the record as a whole does not suggest that this stack would qualify as a diary. The definition adopted in this opinion, however, leaves room for a class of goods to qualify as unbound diaries, namely, those not permanently fastened. In sum, the imported articles are not "bound" because they are in loose-leaf binders.

IV.

Despite Customs' relative expertise and the reasoning in its classification ruling, for the reasons stated above, this court holds that Mead's day planners are neither "diaries" nor "bound." The classification ruling at issue here lacks the power to persuade under the principles set forth in *Skidmore*. Because the imported articles are properly classified under the "other" provision of subheading 4820.10.40, this court reverses the decision of the Court of International Trade.

COSTS

Each party shall bear its own costs.

REVERSED

FUJITSU GENERAL AMERICA, INC., (SUCCESSOR-IN-INTEREST TO TEKNIKA ELECTRONICS CORP.), PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01–1042

(Decided March 20, 2002)

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Appealed from: United States Court of International Trade
Judge DONALD C. POGUE

Before SCHALL, GAJARSA, and LINN, *Circuit Judges*.

SCHALL, *Circuit Judge*.

Plaintiff-Appellant Fujitsu General America, Inc. ("Fujitsu") is the successor-in-interest to Teknika Electronics Corp. ("Teknika"). Between 1986 and 1988, Teknika imported into the United States color televisions manufactured in Japan by Fujitsu General Limited (formerly known as General Corporation) ("Fujitsu General"). The color televisions that Teknika imported were subject to a 1971 antidumping finding. *See Television Receiving Sets, Monochrome and Color, From Japan*, 36 Fed. Reg. 4,597 (Dep't Treas. Mar. 10, 1971). Between November of 1997 and February of 1998, the United States Customs Service ("Customs") liquidated entries of the color televisions that occurred between March 20, 1986, and March 11, 1988, and assessed antidumping duties on the entries.[1] The liquidations followed litigation in the United States Court of International Trade between Fujitsu General and the

[1] To the extent relevant to this case, "liquidation" is "the final computation or ascertainment of the duties * * * accruing on an entry." 19 C.F.R. § 159.1 (1997). *See Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1118 (Fed. Cir. 1998).

government concerning the proper antidumping duty rate for the color televisions, during which Customs was enjoined by the court from liquidating the entries.

As the successor to Teknika, Fujitsu initiated three protests with respect to Customs' liquidation of the entries.[2] Fujitsu challenged the liquidation of the entries as untimely and the assessment of interest on the antidumping duties found to be due as unlawful. After Customs denied all three protests, Fujitsu brought suit in the Court of International Trade. Fujitsu contended that Customs had improperly failed to liquidate the entries within six months of having received notice that the injunction against liquidation had been removed. According to Fujitsu, pursuant to 19 U.S.C. § 1504(d),[3] that resulted in the entries being deemed liquidated at the rate of duty asserted on entry. Fujitsu also renewed its challenge to the assessment of interest. On cross-motions for summary judgment, the Court of International Trade granted summary judgment in favor of the United States. The court held that, as far as Fujitsu's first and second protests were concerned, it lacked jurisdiction to consider whether the entries at issue were deemed liquidated under section 1504(d). The court based its ruling on the fact that the deemed liquidation claims had not been raised before Customs by protest within 90 days of the challenged liquidations, as required by 19 U.S.C. § 1514(c)(3). *Fujitsu Gen. Am., Inc. v. United States*, 110 F. Supp. 2d 1061 (Ct. Int'l Trade 2000) ("*Fujitsu*"). Next, the Court of International Trade addressed the deemed liquidation claim in Fujitsu's third protest. The court found that the claim had been timely raised in the protest. On the merits, the court determined that since the liquidation challenged in the protest had occurred less than six months after Customs received notice to liquidate the entries at issue, the entries were not deemed liquidated under section 1504(d). *Id.* at 1077. Finally, the court upheld the assessment of interest on the antidumping duties that had been found to be due. Fujitsu now appeals from the court's decision. We affirm.[4]

BACKGROUND

I.

The pertinent facts are not in dispute. As noted, the color televisions that were imported by Fujitsu were subject to an antidumping duty. *See* 19 U.S.C. § 1673. During the relevant period, antidumping duties assessed on color televisions from Japan were subject to periodic review by the United States Department of Commerce ("Commerce"). 19 U.S.C. § 1675(a)(1). After each review, duties were assessed retroactively on the entries covered by the review, and future entries became subject to a deposit requirement at the dumping rate calculated in the review. *Id.*

[2] In the interest of clarity, we hereafter refer to Fujitsu as the importer of the televisions.

[3] Unless otherwise indicated, all statutory references are to the 1994 version of the United States Code, the relevant provisions of which were in place (or substantively identical to provisions in place) during the relevant time period.

[4] On appeal, Fujitsu does not challenge the Court of International Trade's ruling that Customs properly assessed interest on the antidumping duties found to be due. Its sole contention is that no antidumping duties were due, and hence no interest should have been assessed, because the entries at issue should have been deemed liquidated by operation of law at the rates of duty asserted on entry, which were either zero or *de minimis*.

In a series of periodic reviews published between 1981 and 1987, Commerce found the dumping margin for the color televisions imported by Fujitsu to be either zero or *de minimis*. *See Television Receiving Sets, Monochrome and Color, from Japan*, 46 Fed. Reg. 30,163 (Dep't Commerce, June 5, 1981); *Television Receiving Sets, Monochrome and Color, from Japan*, 50 Fed. Reg. 24,278 (Dep't Commerce, June 10, 1985); *Television Receiving Sets, Monochrome and Color, from Japan*, 52 Fed. Reg. 8,940 (Dep't Commerce, Mar. 20, 1987). Thereafter, in a subsequent review published on February 11, 1988, Commerce calculated a dumping margin of 4.06%. *Television Receiving Sets, Monochrome and Color, from Japan*, 53 Fed. Reg. 4050 (Dep't Commerce, Feb. 11, 1988). As a result of these reviews, the televisions imported by Fujitsu during the period from March 20, 1986 until February 11, 1988, required no cash deposit, while televisions imported by Fujitsu between February 11 and March 11, 1988, required a cash deposit of 4.06%. However, Customs did not liquidate the March 20, 1986—March 11, 1988 entries at issue at the above rates, since the administrative review process had been initiated with respect to the entries. *Fujitsu*, 110 F. Supp. 2d at 1067.

On February 11, 1991, Commerce published the results of the administrative review that had been initiated with respect to the 1986–1988 entries. *Television Receiving Sets, Monochrome and Color, from Japan*, 56 Fed. Reg. 5,392 (Dep't Commerce, Feb. 11, 1991). In that review, Commerce calculated a dumping margin for the entries of 35.40%. Fujitsu General, the manufacturer of the televisions, challenged the dumping margin determination by bringing an action in the Court of International Trade under 19 U.S.C. § 1516a(a)(2)(B)(iii). Pursuant to 19 U.S.C. § 1516a(c)(2), the court promptly enjoined Commerce from liquidating the 1986–1988 entries during the pendency of the litigation. *See Fujitsu*, 110 F. Supp. 2d at 1065. In due course, the court granted Commerce's request to remand the case for a recalculation of the dumping margin. After Commerce reduced the dumping margin for the entries from 35.40% to 26.17% in its remand determination, the court affirmed the modified results of the administrative review. *See Fujitsu Gen. Ltd. v. United States*, 883 F. Supp. 728 (Ct. Int'l Trade 1995). Thereafter, on July 3, 1996, this court affirmed the Court of International Trade's approval of Commerce's 26.17% dumping margin determination. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034 (Fed. Cir. 1996) ("*Fujitsu General*"). The court's mandate issued on August 26, 1996, and Fujitsu General's time to petition for *certiorari* to the United States Supreme Court expired on October 1, 1996. *See Fujitsu*, 110 F. Supp. 2d at 1065; 28 U.S.C. § 2101(c).

On September 16, 1997, Commerce published notice of the *Fujitsu General* decision in the Federal Register. *See* 62 Fed. Reg. 48,592 (Dep't Commerce, Sept. 16, 1997). Ten days later, on September 26, 1997, Commerce sent Customs an e-mail instructing it to liquidate the 1986–1988 entries at the affirmed 26.17% dumping margin. Pursuant to those instructions, Customs liquidated the entries on multiple occasions between November of 1997 and February of 1998.

Fujitsu filed three separate protests of the liquidations, under 19 U.S.C. § 1514. First, on February 11, 1998, Fujitsu filed Protest No. 2704–98–100059 ("Protest 1"), challenging Customs' assessment of interest in connection with the liquidation of entries on November 14, 1997, and December 5, 1997. *See Fujitsu*, 110 F. Supp. 2d at 1065–66. One month later, Customs denied the protest. *See id.* at 1066. Thereafter, on April 15, 1998, Fujitsu sent Customs a letter in which it sought to supplement Protest 1 with a claim that the protested liquidations were improper because the entries previously had been "deemed liquidated" at the rate and amount of duties asserted at the time of entry more than a decade earlier. *See id*. Customs acknowledged receipt of the letter but refused to reconsider its denial of Protest 1. *See Fujitsu*, 110 F. Supp. 2d at 1066.

On February 11, 1998, the same day it filed Protest 1, Fujitsu filed Protest No. 3001–98–100026 ("Protest 2"). In Protest 2, Fujitsu challenged Customs' assessment of interest on entries liquidated on November 28, 1997. *See id.* Thereafter, on March 30, 1998, before Customs had ruled on Protest 2, Fujitsu supplemented the protest. As in the Case of Protest 1, Fujitsu sought to add the claim that the challenged liquidation was unlawful because the entries were already deemed liquidated. *See id.* On April 22, 1998, Customs denied Protest 2. *See id.*

Finally, on March 24, 1998, Fujitsu filed Protest No. 5301–98–100053 ("Protest 3"). In that protest, Fujitsu challenged Customs' assessment of interest in connection with the liquidation of entries on February 27, 1998. *See id.* Subsequently, on April 1, 1998, Fujitsu supplemented Protest 3 with a deemed liquidation claim. Fujitsu sent its April 1, 1998 letter alleging deemed liquidation before Customs had ruled on Protest 3, and, unlike the deemed liquidation claims filed in connection with Protests 1 and 2, within ninety days of the protested liquidation. *See id.* Customs denied Protest 3 on April 10, 1998.

II.

Fujitsu filed suit in the Court of International Trade to contest the denial of its protests.[5] In due course, the parties cross-moved for summary judgment. Thereafter, in an opinion issued on August 15, 2000, the Court of International Trade denied Fujitsu's motion and granted the government's. The court held that it lacked jurisdiction to hear the deemed liquidation claims asserted in connection with Protests 1 and 2 because the claims had not been timely raised before Customs. *See Fujitsu*, 110 F. Supp. 2d at 1067–74. As far as Protest 3 was concerned, the court held that it had jurisdiction to adjudicate the deemed liquidation claim relating to the February 27, 1998, entries because Fujitsu had timely raised the claim before Customs. The court rejected the claim on

[5] Fujitsu filed two separate actions. Because the two actions essentially "shared the same legal issues as well as the same basic circumstances," the Court of International Trade consolidated them *sua sponte* with the parties' permission. *See Fujitsu*, 110 F. Supp. 2d at 1066 n.1.

the merits, however. The court concluded that Customs had liquidated the entries at issue within six months of receiving notice of the removal of the suspension of liquidation that had been in effect pending the litigation involving the final results of the administrative review, as required by 19 U.S.C. § 1504(d).[6] *See id.* at 1074–78. Fujitsu timely appealed the court's ruling. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

Discussion

Fujitsu's appeal challenges two rulings of the Court of International Trade. The first ruling is the court's holding that it lacked jurisdiction to consider the deemed liquidation claims relating to Protests 1 and 2, because Fujitsu failed to timely protest either the liquidations of November 14 and December 5, 1997 (Protest 1), or the liquidation of November 28, 1997 (Protest 2). The second ruling is the court's holding that the entries whose liquidation Fujitsu challenged in Protest 3 were not deemed liquidated at the rate of duty asserted on entry.

Both the jurisdictional ruling relating to Protests 1 and 2 and the merits ruling relating to Protest 3 were based upon the Court of International Trade's interpretation of the relevant statutory provisions. We review the court's interpretation of those statutory provisions *de novo*. *See VWP of Am., Inc. v. United States*, 175 F.3d 1327, 1334 (Fed. Cir. 1999). In Part I below, we address the jurisdictional issues relating to the deemed liquidation claims asserted in connection with Protests 1 and 2. In Part II, we address the merits of the deemed liquidation claim in Protest 3.

I.

A. The jurisdictional scheme

The jurisdiction of the Court of International Trade is set forth in 28 U.S.C. § 1581. The two provisions of the statute that are relevant to this case are sections 1581(a) and 1581(i).

Under section 1581(a), the Court of International Trade has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." Section 515 is codified at 19 U.S.C. § 1515. Section 1515 provides for Customs' review and subsequent allowance or denial of protests that are "filed in accordance with" 19 U.S.C. § 1514. 19 U.S.C. § 1515(a). Section 1514(a) lists the decisions of Customs that may be the subject of protests. Included are decisions relating to "the liquidation or reliquidation of an entry." 19 U.S.C. § 1514(a)(5). Section 1514(a) states that a Customs decision that may be the subject of a protest shall be "final and conclusive upon all persons * * * unless a protest is filed in accordance with this section." The time for filing a protest of a decision described in section 1514(a) is "within ninety days after notice of liquidation." 19 U.S.C. § 1514(c)(3). We have held that the Court of International Trade's au-

[6] The Court of International Trade also ruled that Customs properly assessed interest on the antidumping duties found to be due on the entries at issue. As noted above, that ruling is not before us.

thority to hear a claim under section 1581(a) depends upon the importer raising the claim in a valid protest filed with Customs within the prescribed 90-day period, or alternatively, in a protest coming within an exception that excuses a failure to meet the deadline. *See Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345–46 (Fed. Cir. 1995).

Section 1581(i) provides in pertinent part as follows:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsection * * * (a) of this section * * *, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * administration and enforcement with respect to the matters referred to in * * * subsection * * * (a) * * * of this section.

We have described section 1581(i) as embodying a "residual" grant of jurisdiction, *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1584 n.4 (Fed. Cir. 1994), and we have stated that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)).

B. Whether, under 28 U.S.C. § 1581(a), the Court of International Trade had jurisdiction over the deemed-liquidation claim relating to Protest 2

Fujitsu points to 28 U.S.C. § 1581(a) and argues that the Court of International Trade erred in holding that it lacked jurisdiction over the deemed liquidation claim relating to Protest 2.[7] As just seen, subsection (c)(3) of section 1514 requires that an importer file a protest challenging a Customs decision within 90 days of receiving notice of liquidation. On February 11, 1998, Fujitsu timely filed Protest 2, challenging Customs' assessment of interest on the duties due on the entries liquidated on November 28, 1997. However, it submitted the letter raising its deemed liquidation claim on March 30, 1998, more than ninety days after liquidation. *See Fujitsu*, 110 F. Supp. 2d at 1070. Consequently, unless the deemed liquidation claim came within a recognized exception to the 90-day deadline prescribed by section 1514(c)(3), the Court of International Trade lacked authority to review the claim under section 1581(a).

Fujitsu attempts to avail itself of such an exception by arguing that its deemed liquidation claim was a "new ground" in support of the original protest. The "new ground" exception to the 90-day filing requirement in 19 U.S.C. § 1514(c)(3) is found in 19 U.S.C. § 1514(c)(1). Section 1514(c)(1) provides in relevant part that "[n]ew grounds in support of objections raised by a valid protest * * * may be presented for consideration in connection with the review of such protest pursuant to section

[7] Fujitsu does not assert that the Court of International Trade erred in not asserting section 1581(a) jurisdiction with respect to the deemed liquidation claim relating to Protest 1.

1515 of this title at any time prior to the disposition of the protest in accordance with that section."

In *Pagoda Trading Corp. v. United States*, 804 F.2d 665 (Fed. Cir. 1986), we explained that in order for a supplemental deemed liquidation claim to qualify as a "new ground" in support of a timely protest, the timely protest must be sufficient to advise Customs that liquidation is being challenged, and the deemed liquidation claim must be raised before Customs rules on the protest. *Id.* at 668–69. Applying the two-part *Pagoda* standard, Fujitsu asserts that its timely protest of the assessment of interest put Customs on notice that the liquidation of entries on November 28, 1997, was being challenged. It also asserts, and it is undisputed, that its March 30, 1998 filing of the deemed liquidation claim predated Customs' April 22, 1998 rejection of the protest. Therefore, Fujitsu argues, its deemed liquidation claim constituted a "new ground" in support of its timely protests of the assessment of interest. Accordingly, the Court of International Trade erred in failing to consider it under § 1581(a).

We are unable to agree with Fujitsu. In *Pagoda*, we stated that, in order to qualify as a "new ground" in support of a protest, a supplemental claim must "challenge[] the same 'decisions' as those challenged in the original protest." 804 F.2d at 668. The need to determine whether two claims challenge the same Customs decision, thus permitting the supplemental claim to satisfy the requirements for a "new ground," follows from the language of 19 U.S.C. § 1514(a). Section 1514(a) sets forth the protestable "decisions of the Customs Service." In doing so, it lists "all charges or exactions" in section 1514(a)(3) separately from "the liquidation or reliquidation of an entry" in section 1514(a)(5).[8] In other words, the statute identifies charge or exaction decisions, such as the interest assessments in this case, as separate and distinct from liquidation decisions.

The conclusion that interest assessments and liquidations involve different Customs decisions for purposes of section 1514 is supported by *New Zealand Lamb Co. v. United States*, 40 F.3d 377 (Fed. Cir. 1994). At issue in that case were eight entries of lamb meat by New Zealand Lamb. Customs effected final liquidation of six of the entries on December 15, 1989, and two of the entries on December 22, 1989. When it did so, it determined that countervailing duties were due in an amount greater than what had been deposited for estimated duties. It therefore assessed such additional duties when it liquidated the two sets of entries. *Id.* at 378–79. Subsequently, on March 23, 1990, Customs billed New Zealand Lamb for interest on the additional duties. The billing came ninety-nine days after the six December 15, 1989 liquidations and ninety-two days after the December 22, 1989 liquidations. On June 21, 1990, exactly ninety days after it was billed for the interest, New Zealand Lamb filed a

[8] We have held that Customs' assessment of interest falls within the "all charges and exactions" language of section 1514(a)(3). *See, e.g., Castelazo & Assocs. v. United States*, 126 F.3d 1460, 1462 (Fed. Cir. 1997). Thus, when Fujitsu protested the assessment of interest on antidumping duties that Commerce had found to be due, it was lodging a section 1514(a)(3) protest.

protest with Customs pursuant to 19 U.S.C. § 1514(c), in which it challenged the assessment of interest. *Id.* at 379.

In *New Zealand Lamb*, we considered whether the protest of Customs' assessment of interest on the countervailing duties, which was filed more than ninety days after liquidation but within ninety days of the interest assessment, was timely under § 1514(c). We held that the protest was timely. In so holding, we rejected the government's argument that, by operation of 19 U.S.C. § 1677g (1988), the eight liquidations for increased countervailing duties amounted to assessments of interest, irrespective of whether interest was mentioned in the bulletin notices liquidating the entries.[9] *Id.* at 381. We noted that interest on the underpayment of duties was a charge within the "jurisdiction of the Secretary of the Treasury" under 19 U.S.C. § 1514(a)(3). Continuing, we stated that there could not be a decision on a charge for purposes of starting the running of a limitations period until the party levying the charge announced that the charge was being levied and stated the amount of the charge, or the method of computing the charge. *Id.* at 382. We concluded:

> [T]he liquidations in this case, which made no mention of interest, were not decisions regarding interest for purposes of starting the running of the § 1514 limitations period against New Zealand Lamb. Such a decision did not come until March 23, 1990, when Customs billed New Zealand Lamb for the interest.

Id. (footnote omitted). *See also Castelazo*, 126 F.3d at 1463 (stating that under section 1514 "Customs' decisions on charges or exactions, such as assessed interest, are independent of its decisions on liquidation or reliquidation.").

Fujitsu's deemed liquidation claim relating to Protest 2 was not timely under section 1514(c)(3). Neither did the claim constitute a "new ground" in support of the challenge to the assessment of interest in Protest 2. For these reasons, the Court of International Trade did not err in refusing to assert jurisdiction over the claim under 28 U.S.C. § 1581(a).

A. Whether, under 28 U.S.C. § 1581(i), the Court of International Trade had jurisdiction over the deemed liquidation claims relating to Protests 1 and 2

Alternatively, Fujitsu contends that 28 U.S.C. § 1581(i) vested the Court of International Trade with the authority to review its deemed liquidation claim relating to Protest 2. It also contends that the statute gave the court authority to review its deemed liquidation claim relating to Protest 1. We disagree. Fujitsu's argument runs afoul of the rule, noted above, that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection

[9] Section 1677g provides, in relevant part, that "[i]nterest shall be payable on * * * underpayments of amounts deposited on merchandise entered * * * for consumption on and after the date of publication of a countervailing * * * duty order." 19 U.S.C. § 1677g(a).

would be manifestly inadequate." *Norcal/Crosetti Foods*, 963 F.2d at 359 (quoting *Miller*, 824 F.2d at 963).

In this case, "jurisdiction under another subsection of § 1581 could have been available," and "the remedy provided under that other subsection" would not have been "manifestly inadequate." Fujitsu could have invoked the jurisdiction of the Court of International Trade under 28 U.S.C. § 1581(a) if, pursuant to 19 U.S.C. § 1514(a)(5), it had timely protested the liquidations of November 14 and December 5, 1997 (Protest 1), and the liquidation of November 28, 1997 (Protest 2). Indeed, Fujitsu was able to invoke the jurisdiction of the court in the case of its challenge to the liquidation of February 27, 1998 (Protest 3), because it timely protested the liquidation.

Generally, an importer's failure to file a timely protest precludes the Court of International Trade from exercising its section 1581(i) residual jurisdiction. *See Juice Farms*, 68 F.3d at 1346. Fujitsu argues, nevertheless, that our decision in *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550 (Fed. Cir. 1997), supports its contention that the Court of International Trade erred in not invoking its § 1581(i) jurisdiction to consider Fujitsu's deemed liquidation claims. *Cherry Hill* does not help Fujitsu, however.

In *Cherry Hill*, Cherry Hill Textiles, Inc., ("Cherry Hill") imported textile-dyeing machines from Taiwan. The machines were entered as duty free through the Port of Newark, New Jersey, on September 18, 1987. On October 28, 1988, more than thirteen months after the date of entry, Customs liquidated the entry as dutiable in the amount of $12,220.62. *Cherry Hill*, 112 F.3d at 1551. Customs gave notice to Cherry Hill of the liquidation and subsequently demanded payment from Cherry Hill's surety, International Cargo & Surety Insurance Co. ("IC & S") under its bond. IC & S refused to make payment. It did not, however, file a formal protest under 19 U.S.C. § 1514 of either the liquidation or the demand for payment. *Id.*

After the 90-day period for filing a protest had passed, the government filed an enforcement action in the Court of International Trade in which it sought to recover the $12,220.62 in assessed duties. In due course, the government moved for summary judgment. In so doing, it contended that IC & S's failure to file a protest against either the liquidation or the demand for payment under the bond rendered the October 28, 1988, liquidation "final and conclusive" within the meaning of 19 U.S.C. § 1514(a), so that judicial review of IC & S's affirmative defenses was precluded. IC & S argued in response that the provision of section 1514(a) that makes unprotested liquidations "final and conclusive" applies to actions brought by importers or sureties to recover excess duty deposits, but not to government enforcement actions for unpaid duties. The Court of International Trade rejected IC & S's argument and granted summary judgment for the government in the full amount of the assessed duties, plus interest. *Id.* IC & S then appealed to this court.

We framed the issue before us in *Cherry Hill* as follows:

> It is undisputed that an administrative protest must be filed if an importer or surety wishes to file suit in the Court of International Trade challenging the liquidation of a Customs entry. The principal issue in this case is whether an importer or surety must file such an administrative protest if the importer or surety wishes to defend against a government enforcement action for the underpayment of duties by challenging the lawfulness of a liquidation.

Id. at 1552. On appeal, IC & S advanced two contentions. First, it argued that the protest requirement of section 1514 applies to actions brought by importers or sureties for the refund of duties paid, but that it does not apply to enforcement actions brought by the government to collect underpayments of duties. *Cherry Hill*, 112 F.3d at 1551. Accordingly, IC & S claimed that it was entitled to challenge the government's enforcement action, even though it had not filed a timely protest of the liquidation with Customs. We rejected this argument. In so doing, we stated: "The language of section 1514, that a liquidation will be 'final and conclusive' unless protested, is sufficiently broad that it indicates that Congress meant to foreclose unprotested issues from being raised in any context, not simply to impose a prerequisite to bringing suit." *Id.* at 1557.

IC & S also argued that summary judgment should not have been granted in favor of the government because the entry of September 18, 1987, was "deemed liquidated" by operation of law when Customs failed to liquidate it within one year of the date of entry. *See* 19 U.S.C. § 1504(a). IC & S urged that it should not have been required to protest the October 28, 1988, liquidation in order to be entitled to argue later that Customs was legally foreclosed from liquidating the entry anew after the entry had already been deemed liquidated. *Cherry Hill*, 112 F.3d at 1558. We looked more favorably on this argument by IC & S, which we characterized as a "narrower ground for reversal." *Id.* We pointed out that in *United States v. Sherman & Sons Co.*, 237 U.S. 146 (1915), the Supreme Court concluded that "an importer who is subjected to a reliquidation based on a charge of fraud is not relegated to the protest and appeal mechanism, but may challenge the finding of fraud in a government enforcement action brought in court even if the importer filed no protest of the reliquidation." *Cherry Hill*, 112 F.3d at 1554 (citing *Sherman*, 237 U.S. at 158). We reasoned in *Cherry Hill* that "'deemed liquidation' under section 1504 has the same effect as the expiration of the time for reliquidation in *Sherman*: it subjects any further collection efforts by the government in connection with the same entry to dismissal for failure to state a claim upon which relief can be granted." *Id.* at 1559.[10] Accordingly, we held that IC & S could raise deemed liquidation as a defense in the government's enforcement action.

[10] The reliquidation in *Sherman* came more than one year after the original liquidation.

The critical difference between *Cherry Hill* and this case, of course, is that Fujitsu is not seeking to use its deemed liquidation claim as a shield in a government enforcement action. Rather, it is seeking to use the claim as a sword in a refund action under 28 U.S.C. § 1581(i). As noted above, the *Cherry Hill* court recognized that "[i]t is undisputed that an administrative protest must be filed if an importer or surety wishes to file suit in the Court of International Trade challenging the liquidation of a Customs entry." 112 F.3d at 1552. In addition, as discussed above, jurisdiction may not be invoked under § 1581(i) "when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Norcal/Crosetti Foods*, 963 F.2d at 359 (quoting *Miller*, 824 F.2d at 963). That plainly is not the case here since, as already noted, Fujitsu could have timely protested Customs' purported liquidations under 19 U.S.C. § 1514(a)(5). In that event, the Court of International Trade would have had jurisdiction over Fujitsu's suit under 28 U.S.C. § 1581(a). We agree with the Court of International Trade that "[t]o find that *Cherry Hill* affords Fujitsu jurisdiction under 28 U.S.C. § 1581(i) to raise its deemed liquidation argument in the circumstances of this case would require us to create an exception to the well-established [rule with respect to] § 1581(i) [jurisdiction] that we are unwilling to make." *Fujitsu*, 110 F. Supp. 2d at 1073. Accordingly, we will not disturb the Court of International Trade's ruling that it lacked jurisdiction under section 1581(i) to consider Fujitsu's Protest 1 and Protest 2 deemed liquidation claims.

II.

We turn now to Fujitsu's deemed liquidation claim relating to the entries that Customs liquidated on February 27, 1998 (Protest 3). The Court of International Trade exercised jurisdiction over this claim because Fujitsu timely asserted it in connection with Protest 3 on April 1, 1998. On the merits, the court rejected Fujitsu's argument that the failure of Customs to liquidate the entries within six months of our July 3, 1996, decision in *Fujitsu General* meant that, pursuant to 19 U.S.C. § 1504(d), the entries were deemed liquidated at the rate of duty asserted at entry.

A. Decision of the Court of International Trade on Fujitsu's deemed liquidation claim relating to Protest 3.

Section 1504(d) governs the deemed liquidation of entries whose liquidation previously was suspended by a court order. The statute provides that, except in circumstances not relevant here,

> when a suspension [of liquidation] required by * * * court order is removed, the Customs Service shall liquidate the entry * * * within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry * * * not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as hav-

> ing been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d). Thus, in order for a deemed liquidation to occur, (1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice. The Court of International Trade rejected Fujitsu's deemed liquidation claim because it ruled that Customs had liquidated the entries at issue within six months of September 16, 1997, the date on which Commerce published notice in the Federal Register that the injunction suspending liquidation had been removed. 110 F. Supp. 2d at 1077.

In analyzing Fujitsu's claim, the Court of International Trade first addressed the question of when the suspension of liquidation that was imposed during the *Fujitsu General* litigation was "removed" for purposes of section 1504(d). The court pointed out that 19 U.S.C. § 1516a(e) "explains how liquidation will proceed where entries are subject to a determination that is being judicially reviewed pursuant to § 1516a." *Id.* at 1075. Section 1516a(e) provides as follows:

> **(e) Liquidation in accordance with final decision**
>
> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—
>
> > (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is [sic] entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and
> >
> > (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,
>
> shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

Liquidation of the Protest 3 entries was enjoined pursuant to 19 U.S.C. § 1516a(c)(2). The Court of International Trade determined that, as used in section 1516a(e), the term "final" means "conclusive" and that a court decision is conclusive when it can no longer be appealed. *Fujitsu*, 110 F. Supp. 2d at 1075. The court reasoned that our decision of July 3, 1996 in *Fujitsu General* could not have served as notice to Customs of the removal of the court-ordered suspension because, under section 1516a(e)(2), the injunction did not dissolve on that date. Rather, the injunction dissolved on October 1, 1996, when "the time allowed for applying for a writ of certiorari for review in the U.S. Supreme Court expired." *Id.* In reaching its conclusion as to when our decision in *Fujitsu General* became "final," the Court of International Trade relied on decisions of this court holding that a decision of the Court of International Trade is not "final" for purposes of section 1516a(e) when it has been appealed to the Federal Circuit. *See Hosiden Corp v. Advanced Display Mfrs. of America*, 85 F.3d 589, 591 (Fed. Cir. 1996); *Timken Co. v. United States*, 893 F.2d 337, 339–40 (Fed. Cir. 1990).

Having determined that our decision in *Fujitsu General*, which caused the suspension of liquidation to be removed, became final on October 1, 1996, the Court of International Trade turned to the question of when Customs received notice that the suspension had been removed. Preliminarily, the court rejected the proposition that issuance of the *Fujitsu General* decision itself constituted notice for purposes of section 1504(d). Noting that "Customs' role in antidumping matters is purely ministerial," *see Mitsubishi Elects. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994), the court stated that it would not "attribute notice to Customs of a court decision reviewing a Commerce determination made under 19 U.S.C. § 1516a(a) without publication of notice of the court decision by Commerce in the Federal Register." *Fujitsu*, 110 F. Supp. 2d at 1077 (footnote omitted). Accordingly, the court held that Customs received notice of the removal of the suspension of liquidation relating to the entries at issue in Protest 3 only when Commerce[11] published the following notice in the Federal Register on September 16, 1997:

> As there is now a final and conclusive court decision in this action, we are amending our final results of review in this matter and we will subsequently instruct the U.S. Customs Service to liquidate entries subject to this review. * * * Pursuant to 19 U.S.C. § 1516a(e), we are now amending the final results of administrative review for television receivers, monochrome and color, from Japan, with respect to [Fujitsu General Limited], for the above-referenced periods. The revised weighted-average margin for these periods is 26.17 percent.

62 Fed. Reg. 48,952. The court also rejected the government's argument that Customs did not receive notice of the removal of the suspension of liquidation until Commerce e-mailed liquidation instructions to Customs on September 26, 1997. *See Fujitsu*, 110 F. Supp. 2d at 1077.

The Court of International Trade ruled that since Customs had liquidated the Protest 3 entries on February 27, 1998, within six months of the September 16, 1997 Federal Register notice, the requirements for deemed liquidation under 19 U.S.C. § 1504(d) were not met. *Id.* at 1077.

The Court of International Trade recognized the long delay between October 1, 1996, when "the court-ordered injunction dissolved," and September 16, 1997, when Commerce finally published the required notice in the Federal Register. *Id.* at 1078. It declined, however, to hold that Fujitsu's merchandise was deemed liquidated because of Commerce's delay in publishing notice of the removal of the suspension of liquidation. The court reasoned that such a remedy would be overly

[11] As seen above, section 1516a(e) refers to "publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision." The term "Secretary" refers to the Secretary of the Treasury. *See* 19 U.S.C. § 1516a(f)(4). The term "administering authority" refers to the Secretary of Commerce. *See* 19 U.S.C. §§ 1516a(f)(1), 1677(1).

broad and would constitute a windfall to Fujitsu, especially since Fujitsu could have brought an action under 28 U.S.C. § 1581(i)(4) to compel Commerce to publish notice and give liquidation instructions to Customs. *See id.* (citing *Am. Permac, Inc. v. United States*, 642 F. Supp. 1187, 1192 n.8 (Ct. Int'l Trade 1986)) (importer may prevent Commerce delay in issuing liquidation instructions by bringing mandamus action); *see also Timken*, 893 F.3d at 342 (affirming grant of importer's application for a writ of mandamus forcing Commerce to publish notice of court decision). The court therefore granted the government's motion for summary judgment.

B. Fujitsu's appeal

Fujitsu challenges the Court of International Trade's rejection of its deemed liquidation claim relating to Protest 3. Pointing to the statutory language that permits Customs to receive notice of the removal of a suspension of liquidation from "the Department of Commerce, other agency, or a court with jurisdiction over the entry," 19 U.S.C. § 1504(d), Fujitsu asserts that through the decision in *Fujitsu General*, Customs was provided with notice of the removal of the suspension of liquidation. Fujitsu argues that since *Fujitsu General* issued on July 3, 1996, and since Customs did not liquidate the Protest 3 entries until more than six months later, on February 27, 1998, the requirements of 19 U.S.C. § 1504(d) for deemed liquidation were met. Consequently, the Protest 3 entries were deemed liquidated at the rate of duty asserted at the time of entry, which was zero.

The question we must answer is this: When, as a matter of law, did Customs receive notice of the removal of the suspension of liquidation? If, as Fujitsu argues, notice was received on July 3, 1996, when *Fujitsu General* issued, Fujitsu wins. The reason is that more than six months passed before Customs liquidated the entries on February 27, 1998. If, as the Court of International Trade held, notice was received on September 16, 1997, when Commerce published notice of the removal in the Federal Register, the government wins. The reason is that Customs liquidated the entries within six months of that date, on February 27, 1998.

(1) Preliminarily, we agree with the Court of International Trade that the suspension of liquidation was removed on October 1, 1996, when the time for petitioning the Supreme Court for a writ of *certiorari* expired. In *Timken*, 893 F.2d 337, we addressed the question of whether a decision of the Court of International Trade that was on appeal to the Federal Circuit was "final" for purposes of 19 U.S.C. § 1516a(e). Answering the question we stated: "We are of the opinion that an appealed CIT decision is not a 'final court decision' within the plain meaning of § 1516a(e)." *Id.* at 339. We explained that, in section 1516a(e), the term "final court decision" must be read together with the words that follow it: "in the action." We reasoned that "[a]n 'action' does not end when one court renders a decision but continues through the appeal process." *Id.* We see no reason not to extend the logic of *Timken* to the question

before us in this case.[12] We do not think that, for present purposes, the "appeal process" in a case is completed until all possible appeals are exhausted. Thus, there is not a "final court decision" in an action that originates in the Court of International Trade and in which there is an appeal to the Federal Circuit until, following the decision of the Federal Circuit, the time for petitioning the Supreme Court for *certiorari* expires without the filing of a petition.

(2) Having determined that the suspension of liquidation was removed on October 1, 1996, we turn to the question of notice. As already seen, section 1504(d) requires that Customs receive notice that a suspension of liquidation has been removed from "the Department of Commerce, other agency, or a court with jurisdiction over the entry." There is no evidence in the record that Customs received such notice prior to September 16, 1997. It is true, as Fujitsu points out, that on or about July 3, 1996, the Clerk of the Federal Circuit served counsel for the government, the Department of Justice, with the decision in *Fujitsu General*. That fact does not help Fujitsu, however. The Justice Department represented Commerce, not Customs, before this court. Service of the *Fujitsu General* decision upon it did not constitute notice to Customs.

Fujitsu argues, nevertheless, that our decision in *Fujitsu General* was available in a variety of commercially available print and electronic media, thus providing Customs with notice for purposes of 19 US.C. § 1504(d). The problem with this argument is that the statute requires that Customs receive notice that a suspension of liquidation has been removed from "the Department of Commerce, other agency, or a court with jurisdiction over the entry." General print or electronic media publication does not satisfy that requirement. In any event, there is no evidence that in fact Customs received general media notice of the *Fujitsu General* decision.

(3) Because no earlier date qualifies, we hold that September 16, 1997 is the earliest date upon which Customs could be deemed to have received notice of the removal of the suspension of liquidation. That is the date upon which Commerce published notice of the *Fujitsu General* decision in the Federal Register.

The government argues, however, that the correct notice date is September 26, 1997, when Commerce e-mailed liquidation instructions to Customs. As noted above, the Court of International Trade rejected that view and ruled that September 16, 1997, was the date upon which notice was received. We agree with the Court of International Trade that it was Commerce's publication of notice of the *Fujitsu General* decision in the Federal Register on September 16, 1997, that constituted notice to Customs under section 1504(d) that the suspension of liquidation had been removed.

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[12] In *Timken*, we expressly declined to consider the question of "whether a decision of [the Federal Circuit] is 'final' within the meaning of § 1516a(e) before the time for application for certiorari to the Supreme Court expires." 893 F.2d at 340 n.5.

Our recent decision in *International Trading Co. v. United States*, No. 00–1577, 2002 U.S. App. LEXIS 3299 (Fed. Cir. Mar. 1, 2002), is instructive. In that case, the liquidation of certain entries of merchandise subject to an antidumping order was suspended while Commerce undertook an administrative review of the order. The suspension of liquidation was pursuant to 19 U.S.C. § 1673b(d).[13] On February 12, 1996, Commerce published the final results of the administrative review in the Federal Register. The Final Results announced an antidumping duty rate of 42.31% for the merchandise. *Id.* at *2. The next day, Commerce sent an e-mail message to Customs. In the message, Customs referred to the Federal Register entry of the previous day and noted that the administrative review had been completed. However, it told Customs not to liquidate any entries covered by the review until it received liquidation instructions. *Id.* at *3. More than six months later, on August 29, 1996, Commerce sent an e-mail message to Customs directing it to assess antidumping duties at the rate of 42.31% on the merchandise. The e-mail message stated that the instructions constituted the removal of the suspension of liquidation that had been in effect during the administrative review. Less than six months later, in October of 1996, Customs liquidated the entries and assessed antidumping duties at the rate of 42.31% of the entered value. *Id.* at *3.

International Trading Company ("ITC"), the importer of the merchandise, filed a formal protest. In the protest, it argued that the entries were deemed liquidated by operation of law under 19 U.S.C. § 1504(d) at the rate asserted at entry, which was the deposit rate of 2.72%. ITC contended that the entries were deemed liquidated because Customs had failed to liquidate them within six months after receiving notice of the removal of the suspension of liquidation. *Id.* at *4. After Customs denied the protest, ITC filed an action in the Court of International Trade, in which it asserted that the entries should have been deemed liquidated at the deposit rate.

The Court of International Trade held that the statutory suspension of liquidation had been removed upon the publication of the final results of the administrative review and that the e-mail message sent to Customs the following day provided notice to Customs that the suspension of liquidation had been lifted. *Int'l. Trading Co. v. United States*, 110 F. Supp. 2d 977, 988 (Ct. Int'l Trade 2000). Accordingly, the court concluded that Customs had failed to liquidate the entries within six months after receiving notice of the removal of the suspension of liquidation. The court therefore held that the entries were deemed liquidated at the 2.72% deposit rate. *Id.* The government appealed the ruling to this court.

[13] Section 1673b(d) provides, in part, that after an affirmative preliminary determination that there exists "a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value," the administering authority (Commerce) "shall order the suspension of liquidation of all entries of merchandise subject to the determination." Simply put, "[l]iquidation is suspended * * * because it is not possible * * * to determine what duties will be assessed against those entries." *Int'l. Trading*, 2002 U.S. App. LEXIS 3299, at *6–7.

On appeal, we affirmed the decision of the Court of International Trade that the entries at issue were deemed liquidated under 19 U.S.C. § 1504(d). In so doing, we determined that Commerce's publication of the final results of the administrative review in the Federal Register constituted notice to Customs within the meaning of section 1504(d). *Int'l. Trading*, 2002 U.S. App. LEXIS 3299, at *17. We stated:

> [T]he date of publication provides an unambiguous and public starting point for the six-month liquidation period, and it does not give the government the ability to postpone indefinitely the removal of suspension of liquidation (and thus the date by which liquidation must be completed) as would be the case if the six-month liquidation period did not begin to run until Commerce sent a message to Customs advising of the removal of suspension of liquidation. Beyond that, treating the date of notification as separate from the date of publication could lead to messy factual disputes about when Customs actually received notice of the removal of the suspension of liquidation. As in this case, the courts would be required to referee debates about what kind of communication from Commerce relating to the announcement of the final results constituted a qualifying "notice" of the removal of suspension.

Id. at *18–19.

We think the rationale articulated in *International Trading* applies in this case. The Court of International Trade enjoined liquidation in *Fujitsu General* pending the litigation. It did so pursuant to 19 U.S.C. § 1516a(c)(2).[14] Thereafter, the suspension of liquidation was removed when the litigation came to an end. It is just as important that there be "an unambiguous and public starting point for the six-month liquidation period" under these circumstances as it is when liquidation of entries is suspended pending an administrative review and thereafter the suspension is removed when the final results of the review are announced. We therefore conclude that Customs received notice of the removal of the suspension of liquidation on September 16, 1997, when Commerce published notice of the *Fujitsu General* decision in the Federal Register. As noted above, in the Federal Register notice, Commerce stated that it would be instructing Customs to liquidate the 1986–1988 entries. This was the first notification that the suspension of liquidation was being removed. Because Customs liquidated the Protest 3 entries less than six months later, on February 27, 1998, the requirements of 19 U.S.C. § 1504(d) for deemed liquidation were not met.

(4) Fujitsu argues, however, that Customs' liquidation of the Protest 3 entries within six months of the Federal Register notice does not end the issue. As it did in the Court of International Trade, it points to 19 U.S.C. § 1516a(e). As seen above, that statute provides that if a "cause of action is sustained in whole or in part by the United States Court of Appeals for

[14] Section 1516a(c)(2) provides that "the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the * * * administering authority * * * upon request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances."

the Federal Circuit[,] * * * entries, the liquidation of which was enjoined under [19 U.S.C. § 1516a(c)(2)], shall be liquidated in accordance with the final court decision in the action." The statute further provides that "notice of the court decision shall be published within ten days from the date of the issuance of the court decision."[15] Fujitsu focuses on the fact that although the *Fujitsu General* decision issued on July 3, 1996, it was not until September 16, 1997, that Commerce published notice of the decision in the Federal Register. Fujitsu argues that the government should not be allowed to "sidestep" the six-month limitation period in 19 U.S.C. § 1504(d) by having Commerce ignore for over a year the ten-day publication requirement in section 1516a(e).

Commerce's unexplained delay in publishing notice of the *Fujitsu General* decision, frustrating though it may be, does not change the result in this case. Section 1504(d) and section 1516a(e) are separate statutes. Section 1504(d) governs deemed liquidation. Deemed liquidation under section 1504(d) can occur only if Customs fails to liquidate entries within six months of having received notice of the removal of a suspension of liquidation. In addition, there is no language in section 1516a(e) that attaches a consequence to a failure by Commerce to meet the ten-day publication requirement, let alone the consequence of deemed liquidation under section 1504(d). *See Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989) (government's failure to meet a statutory deadline for the liquidation of entries under a prior version of section 1504, in the absence of "consequential language" associated with the deadline, did not result in a deemed liquidation). Under these circumstances, there simply is no basis upon which we could hold that because Commerce failed to timely publish notice of our decision in *Fujitsu General*, the entries at issue in Protest 3 were deemed liquidated under 19 U.S.C. § 1504(d).

Finally, a ruling that a deemed liquidation under section 1504(d) results from Commerce's failure to comply with section 1516a(e)(2) would necessarily equate the former provision's requirement that Customs receive notice of the removal of a suspension of liquidation with the latter provision's instruction to publish "notice of the court decision." 19 U.S.C. §§ 1504(d), 1516a(e)(2). However, the publication of a court decision in a case does not necessarily result in Customs' receipt of notice that a suspension of liquidation that was in effect during the case has been removed. For example, our decision in *Fujitsu General* does not even mention the suspension of liquidation that was ordered by the Court of International Trade. We do not think it would be consistent with the statutory scheme to hold that Commerce's publication of notice of a court decision and Customs' receipt of notice are synonymous for purposes of starting the six-month time period for liquidation in section

[15] Fujitsu General's "cause of action" challenged the 35.40% antidumping duty rate found in the administrative review. There is therefore no dispute that the cause of action was "sustained in whole or in part" by our decision in *Fujitsu General*, which affirmed Commerce's determination, on remand, of a reduced 26.17% antidumping duty rate.

1504(d).[16] *See Mitsubishi*, 44 F.3d at 977 ("Customs has a merely ministerial role in liquidating antidumping duties * * *.").

CONCLUSION

The Court of International Trade did not err in holding that it lacked jurisdiction to consider Fujitsu's deemed liquidation claims relating to Protests 1 and 2. Neither did the court err in rejecting Fujitsu's deemed liquidation claim relating to Protest 3. Accordingly, the decision of the court is

COSTS

No costs.

AFFIRMED

TURTLE ISLAND RESTORATION NETWORK, TODD STEINER, THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, THE HUMANE SOCIETY OF THE UNITED STATES, AND THE SIERRA CLUB, PLAINTIFFS-APPELLANTS *v.* DONALD L. EVANS, SECRETARY OF COMMERCE, COLIN L. POWELL, SECRETARY OF STATE, PAUL H. O'NEILL, SECRETARY OF THE TREASURY, DAVID B. SANDLAW, ASSISTANT SECRETARY OF STATE FOR THE BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, PENELOPE D. DALTON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, AND ALAN P. LARSON, UNDER SECRETARY OF STATE FOR ECONOMIC, BUSINESS AND AGRICULTURAL AFFAIRS, DEFENDANTS-CROSS APPELLANTS, AND NATIONAL FISHERIES INSTITUTE, INC., DEFENDANT-CROSS APPELLANT

Appeal No. 00–1569, 00–1581, 00–1582

(Decided March 21, 2002)

Joshua R. Floum, Legal Strategies Group, of Emeryville, California, argued for plaintiffs-appellants. With him on the brief was *Ariela F. St. Pierre*.

M. Alice Thurston, Attorney, Environment and Natural Resources Division, Appellate, Department of Justice, of Washington, DC, argued for defendants-cross appellants. With her on the brief were *John C. Cruden*, Deputy Assistant Attorney General; *Jane P. Davenport*, and *Ellen J. Durkee*, Attorneys, Wildlife & Marine Resources Section. Of counsel were *David M. Cohen*, Director; *Lucius B. Lau*, *Jeffrey C. Dobbins*, and *Jean E. Williams*, Attorneys; Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC. Also of counsel were *Anne V. Liu*, Attorney, National Oceanic & Atmosph. Administration; and *Violanda Botet*, Attorney Advisor, Department of State; *Pamela B. Lawrence*, Attorney, Department of Commerce, of Washington, DC. *Eldon V. C. Greenberg*, Attorney, Garvey Schubert, of Washington, DC, for National Fisheries Institute, Inc.

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[16] To the extent that Congress intended to equate the publication instruction in § 1516a(e)(2) with the notice requirement of § 1504(d), it could have—as it did in 19 U.S.C. § 1675(a)(3)(C), requiring Commerce to publish the results of administrative reviews concerning entries whose liquidation is enjoined—mandated that Commerce publish "the final disposition and issue instructions to the Customs Service with respect to the liquidation of entries pursuant to the review." However, instead of requiring the publication of liquidation instructions, thus potentially evincing an intent to effect notice of the suspension's removal, section 1516a(e)(2) simply instructs Customs to publish notice of the court decision.

Appealed from: United States Court of International Trade
Judge THOMAS J. AQUILINO, JR.

Before NEWMAN, CLEVENGER, and SCHALL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* CLEVENGER. Dissenting opinion filed by *Circuit Judge* NEWMAN.

CLEVENGER, *Circuit Judge*.

This case concerns the implementation of section 609(b) of Public Law 101–162, which prohibits the import of shrimp which have been harvested with fishing technology that may harm sea turtles. Despite having ruled that the government's regulations implementing section 609(b) were not in accordance with that statute, the Court of International Trade refused to enter an injunction directing the government to comply with the law. Plaintiffs, a coalition of environmental organizations and concerned citizens ("Turtle Island"), appeal the Court of International Trade's decision to withhold both an injunction and attorney fees under the Equal Access to Justice Act. Defendants, government officials charged with implementing section 609(b), cross-appeal the judgment of the Court of International Trade that their regulations violate the statute. We hold that the government's regulations are a permissible implementation of the statute and that Turtle Island is not entitled to injunctive relief or attorney fees.

BACKGROUND

Since 1987, United States regulations have required that shrimp trawlers generally install turtle excluder devices ("TEDs") when operating in United States waters where sea turtles are to be found. 50 C.F.R. §§ 223.206, 223.207 (2001). Shrimpers sweep many other denizens of the sea ("bycatch") into their nets when they trawl for shrimp. But unlike fish or shrimp, sea turtles are reptiles and must breathe air. While sea turtles can remain submerged for up to 90 minutes at a time, trawl nets typically are deployed for periods longer than 90 minutes before being hauled up. Sea turtles will drown if they are caught in shrimp nets and held underwater for long periods of time. When fitted into trawl nets, TEDs prevent sea turtles from being retained in the nets—typically by means of a metal grid barring entry to the closed end of the net. The grid bars are spaced so as to let shrimp pass through the grid into the closed end of the net, but the much larger sea turtles cannot pass through and are instead directed out an "escape hatch" above or below the grid.

The domestic shrimp industry strongly opposed the imposition of TED requirements in United States waters. *See, e.g.*, *State of Louisiana, ex rel. Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988). However, the case before us concerns not domestic regulations, but arises instead from nearly a decade's worth of litigation over the enforcement of a statute designed to impose TEDs on shrimping vessels of foreign nations: The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. 101–162, Title VI,

§ 609, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537 note (2000)) ("section 609").

The full text of section 609 is as follows:

> (a) The Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987—
>
> (1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles;
>
> (2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;
>
> (3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;
>
> (4) initiate the amendment of any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and
>
> (5) provide to the Congress by not later than one year after the date of enactment of this section (Nov. 21, 1989)—
>
> (A) a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles;
>
> (B) a list of each nation which conducts commercial shrimp fishing operations which may affect adversely such species of sea turtles; and
>
> (C) a full report on—
>
> (i) the results of his efforts under this section; and
>
> (ii) the status of measures taken by each nation listed pursuant to paragraph (A) or (B) to protect and conserve such sea turtles.
>
> (b)(1) In General.—The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).
>
> (2) Certification Procedure.—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—
>
> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulato-

> ry program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
>
> (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or
>
> (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

Section 609 is divided into two parts, (a) and (b). Part (a) directs the Secretary of State to initiate international negotiations with the aim of protecting those species of sea turtles protected by the domestic TED requirements.[1] Part (b)(1) restricts the importation of shrimp which have been harvested in a manner that may endanger those species of sea turtles. Part (b)(2) establishes a certification procedure,[2] by which nations are exempted from the ban either if they have adopted regulatory measures reducing the incidental catch of sea turtles (e.g., a requirement that their shrimp fleets be equipped with TEDs), or if their operations do not pose any threat to sea turtles (e.g., no endangered turtles inhabit the waters fished by that nation).

This case requires us to decide whether section 609(b)(2)'s certification procedure is the only way a foreign nation may comply with section 609(b). Under the State Department's current regulations (*Revised Guidelines for the Implementation of Section 609 of Public Law 101–162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed. Reg. 36,946 (July 8, 1999) ("the 1999 Guidelines")), shrimp may be imported into the United States under one of two conditions. If the exporter attests that the nation in which the shrimp originated (that is, in whose waters the shrimp were harvested) has been certified under section 609(b)(2), the shrimp may be imported without further ado. Alternatively, if the country of origin has not been certified under section 609(b)(2), shrimp harvested in its waters may still enter the United States if both the exporter and an official of the harvesting nation attest that the individual shipment of shrimp in question was harvested under conditions that do not adversely affect sea turtles. Shipments meeting these conditions include those of aquaculture-grown shrimp, hand-caught shrimp, and shrimp harvested by vessels equipped with TEDs.[3] Thus, under the government's interpretation of section 609, a country may export shrimp to the United States either by requiring its entire fleet to be equipped with TEDs (and becoming certi-

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[1] These species are the loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Erermochelys imbricata*).

[2] The President has delegated his authority to certify nations under 609(b)(2) to the Secretary of State. *Delegation of Authority Regarding Certification of Countries Exporting Shrimp to the United States*, 56 Fed. Reg. 357 (Jan. 4, 1991).

[3] Each shipment must be accompanied by a "DSP–12" form, which attests either that the shipment was harvested in the waters of a certified country or that the shipment was harvested by one of the permissible methods.

fied under section 609(b)(2)), or by requiring TEDs only on those vessels catching shrimp destined for the United States market.[4]

Turtle Island interprets section 609 somewhat differently. Turtle Island believes that section 609 requires the government to prohibit the importation of all shrimp from uncertified countries. Under Turtle Island's interpretation of the statute, certification is the *only* way in which shrimp may be imported into the United States. In practice, this means that in countries where shrimp and endangered sea turtles frequent the same waters, all shrimping vessels must be equipped with TEDs if that country wishes to export shrimp to the United States.[5] Turtle Island argues that this interpretation is mandated by the plain language, intent, and legislative history of the statute.

The contest between Turtle Island and the government over the interpretation of section 609 has a long and tortured history, chiefly marked by the government's Protean efforts to escape the statutory interpretations being imposed upon it by the Court of International Trade. In the government's initial implementation of section 609 (the 1991 and 1993 Guidelines), the embargo was imposed only against shrimp from the Gulf of Mexico-Caribbean-Western Atlantic Ocean sea areas, harvests in those areas being the apparent focus of section 609 when the statute was enacted. *See Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 58 Fed. Reg. 9015 (Feb. 18, 1993); *Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines*, 56 Fed. Reg. 1051 (Jan. 10, 1991). But under the 1991 and 1993 Guidelines, national certification under section 609(b)(2) was the only way a harvesting nation could export shrimp to the United States. The import of shrimp from uncertified countries was prohibited, even if those particular shrimp had been caught using TEDs.

In 1992, the Earth Island Institute, a nonprofit environmental group and Turtle Island's immediate predecessor, filed suit against the government in the Northern District of California. Earth Island sought to force the government to initiate negotiation of international agreements for sea turtle conservation as demanded by section 609(a), and sought to force the government to apply the embargo against all shrimp-exporting countries, not just those of the wider Caribbean area. Earth Island was rebuffed on both fronts. The Ninth Circuit refused to enforce the negotiation directives of section 609(a), reasoning that since the power to negotiate with foreign nations was committed to the executive branch, enforcement of section 609(a) would violate the constitutional separation of powers. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 653 (9th Cir. 1993). Furthermore, the Ninth Circuit ruled that because 28

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[4] In practice, TED-equipped vessels and non-TED-equipped vessels do not seem to fish side by side in the waters of uncertified countries. Currently, uncertified countries that export shrimp to the United States enforce TED requirements on vessels plying certain fisheries but not in other fisheries. *Turtle Island Restoration Network v. Mallett*, 110 F. Supp. 2d 1005, 1011–13 (Ct. Int'l Trade 2000).

[5] Turtle Island apparently does not object to permitting import of aquacultured shrimp or hand-caught shrimp from uncertified countries.

U.S.C. § 1581(i) vests exclusive jurisdiction over embargoes and other trade restrictions in the Court of International Trade, an action to compel enforcement of the import prohibitions of section 609(b) could lie only with that court. *Id.* at 652.

Earth Island proceeded to refile its suit in the Court of International Trade, seeking to force the government to apply section 609(b)'s import restrictions worldwide, not just against shrimp harvested in the wider Caribbean region. The Court of International Trade agreed with Earth Island that the embargo should be applied across the board. The Court of International Trade also made clear its view that the government had limited enforcement of section 609(b) to the Caribbean region not because the government genuinely believed the statute to be so limited, but because of the economic and political fallout that would ensue from targeting countries outside the wider Caribbean. *See Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 576–77 (Ct. Int'l Trade 1995). Finding no geographical restrictions in the text of section 609, the Court of International Trade concluded that the government had not been properly enforcing section 609(b) and directed the government to prohibit the importation of shrimp—"wherever harvested in the wild"—that were harvested with commercial fishing technology that may adversely affect the species of sea turtles protected by section 609. *Id.* at 580.

In response to the Court of International Trade's decision (and following the Court of International Trade's refusal to grant a one-year extension of time for enforcement, *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996)), the Department of State issued new regulations implementing section 609(b). *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 61 Fed. Reg. 17,342 (April 19, 1996). Complying with the Court of International Trade's order in *Earth Island*, the 1996 Guidelines restricted imports of shrimp harvested from all waters inhabited by sea turtles, not just those of the wider Caribbean region. However, in contrast to the 1991 and 1993 Guidelines, the 1996 Guidelines permitted imports of shrimp from waters of uncertified nations—so long as the exporter presented a declaration (the DSP–12 form) attesting that the shrimp accompanying the declaration were harvested under conditions that did not adversely affect the protected species of sea turtles. Thus, under the 1996 Guidelines, a nation did not need to be certified under section 609(b)(2) in order to export shrimp to the United States. Instead, a nation could comply with section 609 simply by employing TEDs on those vessels harvesting shrimp bound for the United States market.

Earth Island was less than pleased with the government's new interpretation of section 609. It filed with the Court of International Trade a "motion to enforce" the Court of International Trade's 1995 judgment, on the grounds that permitting import of TED-caught shrimp from uncertified nations would not conform with the Court of International

Trade's 1995 order directing the State Department to implement section 609 world-wide.

The Court of International Trade agreed with Earth Island that section 609(b)(1)'s embargo should be applied on a nation-by-nation basis, rather than on a shipment-by-shipment basis. The Court of International Trade's interpretation of section 609 rested on two grounds. First, the Court of International Trade refused to read the language of section 609(b)(1) in isolation. Reasoning that section 609(a) directed the Secretary of State to pursue negotiations with foreign nations, and that section 609(b)(2) required the President to determine whether a foreign nation's regulatory programs met United States standards for protection of sea turtles, the Court of International Trade concluded that section 609(b)(2) should be read *in pari materia* with the other sections of section 609. As such, the import restrictions of section 609(b)(2) should be applied nation-by-nation, and not shipment-by-shipment. *Earth Island Inst. v. Christopher*, 942 F Supp. 597, 603–04 (Ct. Int'l Trade 1996).

The Court of International Trade's second rationale was based on its earlier conclusion that section 609 supplemented the Endangered Species Act ("ESA") and should also be read *in pari materia* with the ESA. *Earth Island Inst. v. Christopher*, 890 F Supp. 1085, 1092 (Ct. Int'l Trade 1995). The Court of International Trade took from the ESA the principle that "the plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the costs." *Earth Island*, 942 F. Supp. at 606 (quoting *Earth Island*, 913 F. Supp. at 576, in turn quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978)). Accepting (in the absence of contrary evidence from the government) Earth Island's claim that the shipment-by-shipment approach would undermine the incentive for uncertified nations to become certified, the Court of International Trade agreed with Earth Island that the 1996 Guidelines would "eviscerat[e] the goal of Congress in enacting section 609." *Earth Island*, 942 F. Supp. at 604. Accordingly, the Court of International Trade prohibited the government from permitting the import of shrimp unless the harvesting nation had been certified under section 609(b)(2). *Id.* at 617.

There followed another ruling from the Court of International Trade, denying the government's request for a stay of enforcement but clarifying that the embargo did not apply to aquacultured shrimp or hand-caught shrimp, as these fishing technologies would not adversely affect sea turtles and were exempted from section 609 from the start. *Earth Island Inst. v. Christopher*, 948 F. Supp. 1062, 1069 (Ct. Int'l Trade 1996). However, Earth Island had sought to withdraw its "motion to enforce" shortly before the Court of International Trade issued its first ruling on the 1996 Guidelines, leaving only its request for attorney fees before the Court of International Trade. *Earth Island*, 942 F. Supp. at 602 n.7. The stated purpose of its attempted withdrawal was to preserve Earth Island's right to gather additional evidence and to challenge the government's revised guidelines in a separate action.[6] *Id.*; *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1355 (Fed. Cir. 1998). The Court of International Trade denied Earth Island permission to withdraw, basing its refusal on the public interest at stake in proper enforcement of section 609. *Earth Island*, 942 F. Supp. at 602 n.7.

Upon the government's appeal to this court, we held that Earth Island "did not request permission to withdraw, but unilaterally and unconditionally withdrew its motion." *Earth Island*, 147 F.3d at 1356. We further held that Earth Island's unconditional withdrawal ended the controversy between the parties, thereby terminating the Court of International Trade's jurisdiction over the case except for the matter of attorney fees. *Id.* Accordingly, we vacated the Court of International Trade's orders that had directed the State Department to enforce section 609 on a nation-by-nation basis. *Id.* at 1358.

Meanwhile, during the period that the Court of International Trade had enjoined the government from permitting the import of TED-caught shrimp from uncertified nations, a group of such nations—India, Pakistan, Malaysia, and Thailand—brought a proceeding against the United States before the Dispute Settlement Body of the World Trade Organization ("WTO"), arguing that the enforcement of section 609 under the 1996 Guidelines violated certain provisions of the 1994 General Agreement on Tariffs and Trade ("GATT"). Ultimately, the WTO Appellate Body ruled that section 609 was a permissible conservation measure under GATT Article XX, but that the United States' enforcement of section 609 was discriminatory. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 1998 WL 720123 (Oct. 12, 1998). Specifically, the WTO pointed to the fact that shrimp caught using methods identical to those employed in the United States (*i.e.*, with TEDs) were embargoed solely because they were caught in the waters of uncertified countries. *Id.* at *67. And while the statute itself might permit a flexible approach, the 1996 Guidelines demanded that a country adopt a regulatory regime identical to that of the United States as the only path to certification. *Id.* at *46. Furthermore, the failure of the United States to initiate serious international negotiations to protect sea turtles (as demanded by section 609(a)) supported a finding of unjustifiable discrimination. *Id.* at *51.

After this court vacated the Court of International Trade's injunction against the government, the State Department issued new Guidelines reinstating importation of shrimp from uncertified countries. *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46,094 (Aug. 28, 1998). Like the 1996 Guidelines, the 1998 Guidelines permitted import of shrimp from uncertified countries if the shipment was accompanied by a DSP–12 form attesting that the shrimp had been harvested by vessels equipped with TEDs. Its earlier

[6] Apparently, Earth Island lacked confidence that its challenge to the 1996 Guidelines could be resolved in its favor on the basis of the evidence in record. The decision of the Court of International Trade proved those fears groundless.

victory having been negated for lack of jurisdiction, Earth Island again filed suit challenging the new regulations in the Court of International Trade, which (not surprisingly) again found that importation of shrimp from uncertified countries violated the provisions of section 609(b). *Earth Island Inst. v. Daley*, 48 F. Supp. 2d 1064, 1081 (Ct. Int'l Trade 1999). Soon afterwards, the State Department issued its 1999 Guidelines. Designed to meet the WTO's objections, the 1999 Guidelines took a more flexible stance on which regulatory programs would merit national certification, but the 1999 Guidelines continued to permit importation of TED-caught shrimp from uncertified countries. Accordingly, the Court of International Trade yet again held that the shipment-by-shipment approach violated section 609 and entered a final declaratory judgment in favor of Turtle Island—which by now had been spun off as an independent entity from the Earth Island Institute. *Turtle Island Restoration Network v. Mallett*, 110 F. Supp. 2d 1005, 1018 (Ct. Int'l Trade 2000).

However, although the Court of International Trade concluded "without reservation that the plaintiffs have *prevailed*" in their argument that the importation of TED-caught shrimp from uncertified nations violated the terms of section 609, *id.*, the Court of International Trade denied Turtle Island injunctive relief. Moreover, the Court of International Trade refused to hold that the government's legal position was not substantially justified, barring Turtle Island from collecting attorney fees under the Equal Access to Justice Act. The Court of International Trade appeared to base these conclusions on the fact that of all the countries exporting shrimp to the United States, only Brazil and Australia were not certified, suggesting that relatively few sea turtles were being harmed in the waters of uncertified nations that served the United States shrimp market. *Id.* at 1011–12. Moreover, no nation that had previously established a nation-wide TED program had limited its regulatory program in favor of equipping only those vessels that served the United States market with TEDs. *Id.* at 1013. Given the absence of proof that shrimp trawling by uncertified nations was currently contributing significantly to sea turtle mortality, and in apparent recognition of the traditional reluctance of courts to intrude into matters of foreign relations, the Court of International Trade concluded, somewhat cryptically:

> given the facts and circumstances of this case, which obviously transcend purely domestic concerns, this court is unable to conclude that the government's position currently is not substantially justified. * * *
>
> The court's inability means not only that plaintiff's application for any award of fees etc. cannot be granted, the motion for injunctive relief based upon the declaratory judgment in their favor must also be denied.

Id.

After the Court of International Trade issued its final judgment in *Turtle Island Restoration Network v. Mallett*, Malaysia renewed its challenge to the United States over enforcement of section 609 before a panel of the Dispute Settlement Body of the World Trade Organization. However, the panel ruled, and the Appellate Body affirmed, that the enforcement of section 609 under the State Department's 1999 Guidelines was justified under Article XX of GATT. These conclusions were based in part on the Court of International Trade's refusal to grant Turtle Island an injunction against the government, since under that ruling the United States continued to permit the import of TED-caught shrimp from uncertified countries. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 2001 WL 671012, at *101 (Jun. 15, 2001). Moreover, the United States had initiated serious international negotiations for sea turtle protection, and now required nations to establish for certification a sea turtle program comparable in effectiveness to that of the United States—not necessarily one identical to that of the United States. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 2001 WL 126572, at *38–49; *51–54 (Oct. 22, 2001). Consequently, the enforcement of section 609 was ruled a permissible conservation measure and not discriminatory under Article XX of GATT.

Turtle Island now appeals the Court of International Trade's denial of an injunction and attorney fees. The government appeals the judgment of the Court of International Trade that the importation of TED-caught shrimp from uncertified countries as permitted by the 1999 Guidelines violates section 609. We exercise appellate jurisdiction over the final decision of the Court of International Trade under 28 U.S.C. § 1295(a)(5).

I

We first consider whether the Court of International Trade reached the proper construction of section 609, as the propriety of the Court of International Trade's denial of injunctive relief and attorney fees will hinge on whether Turtle Island or the government has advocated the appropriate interpretation of the statute. We must therefore decide whether section 609(b)(1) of Pub. L. 101–162 prohibits importation of all shrimp or shrimp products from a country not certified under section 609(b)(2), or whether the government may permit the import of individual shipments from uncertified countries if exporters represent that those particular shipments were caught without the use of commercial fishing technology that may adversely affect those species of sea turtles protected by domestic law. Statutory interpretation is a matter of law that we review without deference to the interpretation reached by the Court of International Trade. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1378 (Fed. Cir. 2001).

A

We begin, as in all questions of statutory interpretation, with the plain words of the law, and in this case those words weigh heavily in the government's favor. The operative language of the embargo is found in section (b)(1), which prohibits importation of shrimp, "which have been harvested with commercial fishing technology" that may harm sea turtles, except as provided in (b)(2). The clause "which have been harvested" modifies "shrimp." "Shrimp" are discrete objects, each of which has either been harvested with technology harmful to sea turtles or not. The statute distinguishes between the former shrimp, which are embargoed, and the latter shrimp, which are not. The plain language of the statute provides no basis for embargoing shipments of shrimp which have *not* been harvested with commercial fishing technology that may harm sea turtles. Because TED-caught shrimp have not been harvested with commercial fishing technology that may harm sea turtles, the statutory language does not support embargoing TED-caught shrimp from uncertified countries. Moreover, if certification under (b)(2) was the *only* way shrimp could be imported into the United States, then "which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles" in (b)(1) is largely superfluous language. We cannot see how the "harvested with commercial fishing technology" language could consistently be interpreted to permit import of some shrimp that have been harvested without adverse effect on sea turtles—such as aquacultured or hand-caught shrimp from uncertified countries—but to ban the import of other shrimp that have been harvested without adverse effect on sea turtles—such as TED-caught shrimp from uncertified countries.

Recognizing the primacy of the plain language in the hierarchy of statutory interpretation, Turtle Island tries to advance several arguments under that rubric. It argues that its interpretation is consistent with congressional intent, with other portions of the statute, and with the law's ultimate purpose—all of which might be true but none of which states an argument based on the plain language of the statute. Turtle Island cannot escape the fact that it seeks to interpolate words into the plain language of the statute, reading 609(b)(1) as an embargo on "shrimp which have been harvested *from a nation that employs* commercial fishing technology which may affect adversely said species of sea turtles." While the text might not absolutely bar such an interpolation, this interpretation does not comport with the most direct reading of the law's words.

In any event, we do not find persuasive the argument based on conformity with the remaining sections of section 609. Turtle Island points to section 609(a), which directs the Secretary of State to negotiate with foreign *nations* to protect sea turtles, and to section 609(b)(2), which establishes a procedure for *nations* to be certified as exempt from the embargo of section 609(b)(1). The Court of International Trade drew from this structure the conclusion that, reading those sections of the law *in pari materia* with the embargo provisions, the embargo provisions must refer to other nations, and not to individual shipments of shrimp. *Earth Island*, 942 F. Supp. at 603–604. We cannot agree with this reasoning. The fact that other portions of the statute direct the Secretary of

State to negotiate with and certify nations does not demand that the Secretary apply the embargo to entire nations as well. One negotiates with nations and imports shrimp, not vice versa. Congress drafted sections 609(a) and 609(b)(2) to refer to nations because the negotiation and certification provisions could not have been drafted in any other way—not because Congress made a conscious choice to focus them on nations rather than shipments. An embargo provision, on the other hand, might be drafted either to apply to shipments or to nations, and we do not think Congress was foreclosed from embargoing individual shipments of shrimp simply because it included the embargo provisions in a law that also speaks of nations. We find nothing inherently insensible about applying the negotiation and certification provisions to nations on the one hand, and the embargo provisions to particular shipments of shrimp on the other.

B

Both sides also lay claim to the legislative history of section 609. The State Department finds some congressional intent to delegate the definition of which shrimp should be embargoed, while Turtle Island finds both the nation-by-nation principle and the conclusion that section 609's principal goal is the protection of endangered sea turtle species worldwide. We cannot find support for the State Department's position. While Congress may have intended the administering agency to define which methods of harvesting shrimp may adversely affect sea turtles, we find no intent to delegate the power to define the scope of the embargo itself. But our disagreement with Turtle Island's view of the legislative history is more profound and more damaging to its case. For we find nothing in the legislative history to mandate a nation-by-nation approach, and we find little, if any, indication that minimizing sea turtle drownings was Congress's main concern when it enacted section 609.

The extant legislative history of section 609 consists mostly of speeches on the Senate floor. Turtle Island emphasizes portions of this record in which Senators speak of "other nations" and "countries" to support its position that section 609(b)(1) was intended to operate nation-by-nation. We are not inclined to assign much weight to these excerpts. Although the Senators spoke more in terms of nations than of shipments or vessels, their usage was not consistent. For example, Appropriation Chairman Hollings described the provision when brought to the Senate floor as:

> It calls for a ban on *imports of shrimp from any nation* that: First, fails to adopt a regulatory program for turtle protection which is comparable to that of the United States; and second, has higher incidental catches of sea turtles than U.S. shrimpers.

135 Cong. Rec. 22,493–94 (1989) (emphasis added), but described the final version after conference with the House as follows:

> At the request of the House managers we approved an addition on the ban on *imported shrimp not harvested by vessels using TED's*

> shall not apply [sic] if the "particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting."

135 Cong. Rec. 26,613 (1989) (emphasis added). The relevant provisions of the bill had not changed; Senator Hollings's shift simply indicates how loosely Senators described the bill. Given the imprecision and informality of the floor comments, we are loath to assemble congressional intent from such scraps of casual word choice.

Furthermore, most of the comments marshaled by Turtle Island do not reflect the Senate's interpretation of the embargo provisions of section 609(b)(1), because those comments were made in support of a bill that lacked any embargo provisions at all. As first introduced by Senator Breaux, "Amendment No. 365" included *only* the provisions now appearing as 609(a), requiring the Secretary to initiate negotiations for international sea turtle conservation and to report on other nations' efforts to protect sea turtles. *See* 135 Cong. Rec. 15,508 (1989). Apparently, an earlier measure had included some kind of embargo, but that measure was never brought to the floor because the Senate Finance Committee feared that such an embargo might violate the GATT. *See id.* at 15,509 (statements of Sens. Bentsen and Lott). The floor statements in support of the original bill refer to "other nations" and "countries" because international negotiations were the sole focus of the original bill. While the supporters of the original bill clearly hoped to induce foreign nations to adopt TED requirements, we cannot derive from their description of the negotiation provisions a nation-by-nation approach to the embargo.

The original "Amendment No. 365" was not brought to a vote, but soon resurfaced as a measure including the embargo provisions of 609(b) as well as the negotiation provisions of 609(a). We have no indication why the new embargo provisions did not provoke concerns about GATT violations. But what is unmistakably clear from the discussion on the Senate floor is that the primary purpose of the bill was to protect the domestic shrimping industry, and not the sea turtle. The advocates of the bill were Senators from Gulf states who had long opposed the domestic TED regulations because they believed that TEDs reduced shrimp catches. *See* 135 Cong. Rec. 22,554–55 (1989) (statements of Sens. Johnston and Breaux). The Senators who spoke in favor (none spoke against) feared that American shrimpers would be at a disadvantage competing in the domestic market with foreign shrimpers, who were not burdened with TED regulations. By imposing TED requirements on foreign shrimpers exporting to the United States, the sponsors of section 609 hoped to provide American shrimpers with a level playing field. Senator Shelby's comments in support of the original version of the bill (lacking the embargo provisions) explain this reasoning well:

> Shrimpers are having numerous problems in using the TED's. It is my understanding that the Gulf of Mexico has been overwhelmed with seagrass in recent months causing the clogging of the openings

> of the TED's. Consequently, shrimpers are losing considerable amounts of their catch, which translates into reductions in income. There has been little evidence to date to indicate that the use of TED's will significantly affect the survival rate of sea turtles. * * * The U.S. shrimp industry is being treated unfairly in being asked to risk economic ruin while others are not required to do similarly. The burden of saving the sea turtles should be shared equally. * * * In addition, other countries have extensive commercial shrimp operations that are not subjected to turtle conservation. This places our shrimp industry in a noncompetitive situation because these countries still share the lucrative U.S. market with our domestic shrimpers. Our domestic shrimpers must have a level playing field.

135 Cong. Rec. 15,511 (1989).

Similar arguments were advanced by Senators Bentsen, *id.* at 15,509, Lott, *id.* at 15,509–10, Breaux, *id.* at 15,508–09, and Johnston, 135 Cong. Rec. 22,554 (1989). Each expressed his concern that the domestic shrimp industry was threatened because U.S. shrimpers, bearing the alleged increased costs of TEDs, would have to compete with foreign shrimpers not so burdened. By requiring or encouraging other nations to catch shrimp bound for the United States market with TEDs, imported shrimp would cost more and be less competitive with domestic shrimp. Alternatively, if foreign shrimp was embargoed, the price of shrimp would rise, also benefiting the domestic shrimp industry. *Id.* (statement of Sen. Johnston).

Thus, to the extent legislative history is available, we find that Congress with remarkable unanimity was focused on protecting the domestic shrimp industry, not the sea turtle, when it enacted section 609. Many of the comments made on the Senate floor reflected deep skepticism about the effectiveness of TED requirements, and about the wisdom of placing sea turtle conservation above the economic well-being of domestic shrimpers. We therefore cannot agree with Turtle Island that the fidelity of the government's implementation of section 609 should be measured solely by how effectively the measures protect endangered sea turtles.

Nor can we agree with Turtle Island that requiring foreign nations to install TEDs on vessels not serving the United States market would advance Congress's aim of achieving parity for the domestic shrimp industry. Congress did not seem to foresee that a nation might equip vessels serving the United States market with TEDs but forego TEDs on its other vessels. Turtle Island argues that requiring such nations to equip their entire fleets with TEDs would benefit the United States shrimp industry, because it would place domestic shrimpers exporting shrimp to overseas markets on an equal footing with foreign shrimpers exporting shrimp to the same markets. But coursing through the legislative history is an unswerving focus on the United States market, not overseas markets. There is no indication from the legislative history, and no evidence in the record, that domestic shrimpers compete in foreign markets.

Whether or not Congress was correct that the domestic TED requirements handicapped domestic shrimpers, Congress was concerned with the effects of TEDs on the United States market alone. Congress enacted a measure applicable to only those sea turtles encountered by American shrimpers,[7] and Congress enacted the embargo to protect what it saw as unfair competition in the American market. As such, Congress was concerned with those foreign vessels harvesting shrimp for the United States market, not foreign vessels harvesting shrimp for foreign markets. We find Congress's intent met by the State Department's current system of enforcing section 609(b), which regulates all imports of shrimp into the United States market. The contemporary legislative history provides no basis for extending section 609(b)'s reach in an attempt to control how shrimp bound for foreign markets are harvested.

C

We find further indication that section 609(b)(1) refers to shipments, not nations, when we compare it to similar statutes.[8] Congress has drafted other statutes with explicit nation-by-nation embargoes, but did not do so in the case of section 609(b). Congress has enacted nation-by-nation embargoes triggered by foreign restrictions on fishing rights of U.S. vessels:

> the Secretary of the Treasury shall immediately take such action as may be necessary and appropriate to prohibit the importation into the United States * * * fish or fish products, *from any fishery of the foreign nation concerned*, which the Secretary of State finds to be appropriate * * *.

16 U.S.C. § 1825(b)(2) (2000) (emphasis added); by nations conducting large-scale driftnet fishing outside their exclusive economic zones:

> The President * * * shall direct the Secretary of the Treasury to prohibit the importation into the United States of *fish and fish products * * * from that nation*.

16 U.S.C. § 1826a(b)(3)(A) (2000) (emphasis added); and by fishing operations or other trade threatening endangered species:

> the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of *any products from the offending country* for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization * * *.

22 U.S.C. § 1978(a)(4) (Supp. V 1999) (emphasis added).

When Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate. *See, e.g.*, *I.N.S. v. Phinpathya*, 464 U.S. 183, 190 (1984). In very similar instances, Con-

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[7] Section 609(a) specifies "those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987"—that is, the domestic TED regulations.

[8] We note in passing that section 609(b)(1) seems clearly patterned after the text of the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(a)(2), as that statute stood when section 609 was enacted in 1989. However, neither party submitted an argument in their briefs based on this resemblance.

gress has explicitly embargoed *all* imports from the offending nation, regardless of whether any particular shipment was taken in a manner that would threaten endangered species. The fact that Congress declined to include such language in section 609(b) suggests that Congress did not intend to impose a similar embargo there.

D

Turtle Island also argues that allowing an exporting nation to equip only those vessels serving the United States market will undo the ends of section 609, since those turtles escaping from the TED-equipped trawl nets "inevitably will die" in the nets of other vessels trawling the same waters that are not equipped with TEDs. As we state above, section 609 was not enacted with the primary goal of minimizing sea turtle deaths. But as a matter of pure logic, we cannot agree with Turtle Island's predictions. Assuming sea turtles obey the laws of terrestrial probability, then a fleet partially equipped with TEDs will kill fewer sea turtles than a comparable fleet without any TEDs (so long as there are a finite number of trawling vessels and some sea turtles survive[9]). A fleet fully equipped with TEDs would likely save more turtles, but equipping only a portion of a fleet with TEDs is not entirely futile. Moreover, if Turtle Island's view is correct, then permitting the import of aquacultured or hand-caught shrimp from uncertified nations may also frustrate the purpose of section 609—because nations may export such shrimp to the United States but still harvest shrimp bound for other markets with trawl nets lacking TEDs.

Turtle Island also argues that permitting uncertified nations to export shrimp to the United States will lower the incentive for uncertified nations to become certified. But even if we thought that Turtle Island's approach would encourage more nations to enact certification programs, or save more sea turtles, we cannot give weight to such considerations if the will of Congress is dispositive. To quote Turtle Island's own argument, a court's "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress" simply is not relevant; "[o]nce the meaning of an enactment is discerned * * * the judicial process comes to an end." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Because we find that the combination of plain language, legislative history, and comparison with other statutory provisions decisively establishes the meaning of section 609(b), we need not consider more attenuated arguments on the wisdom of the government's implementation of section 609.

Likewise, because the meaning of section 609 is clear, we need not reach the question of how much deference we ought to accord the State Department's interpretation of section 609, or whether the State Department's interpretation would minimize potential conflicts with international trade agreements. "If the intent of Congress is clear, that is

[9] If the depredations of that portion of the fleet not equipped with TEDs were so great as to drown all the turtles in the area, then both fleets would drown the same number of turtles—that is, all of them. However, not even Turtle Island makes such an allegation.

the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984). The intent of Congress is clear and the government's current implementation of section 609(b) carries out that intent.

CONCLUSION

However much we may respect Turtle Island's long struggle on behalf of the Earth's endangered sea turtles, we cannot find that Congress shared Turtle Island's current position when it enacted section 609 of Pub. L. 101–162. Having concluded that the State Department's interpretation of section 609 is the correct one, we must also hold both that Turtle Island is not entitled to an injunction, and that the government's legal position was substantially justified within the meaning of the Equal Access to Justice Act. We therefore reverse the Court of International Trade's judgment that the government's decision to permit the importation of TED-caught shrimp from uncertified nations is not in accordance with section 609(b) of Pub. L. 101–162, and affirm the Court of International Trade's denial of injunctive relief and attorney fees.

COSTS

No costs.

REVERSED-IN-PART AND AFFIRMED-IN-PART

NEWMAN, *Circuit Judge*, dissenting.

I respectfully dissent, for the majority's decision negates the statutory method of protecting endangered sea turtles. The Court of International Trade applied the statute in accordance with its terms. Whatever the political or diplomatic considerations, neither the executive agency charged with administering the statute, nor this court, has authority to depart from the statute as enacted.

The Court of International Trade held that the State Department's 1998 Revised Guidelines[1] are not consistent with the authorizing statute, section 609 of Public Law 101–162, enacted in 1989 for the protection of endangered sea turtles. The relevant statutory provisions are:

> **§609(b)(1) In general.**—The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

[1] *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46094 (Aug. 28, 1998). The plaintiffs challenged the 1998 Guidelines, now superseded by the 1999 Guidelines, which do not differ as to the point here at issue. *Revised Guidelines for the Implementation of Section 609 of Public Law 101–162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed. Reg. 36946 (July 8, 1999).

> **§609(b)(2) Certification procedure.**—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—
>
> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
>
> (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or
>
> (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

16 U.S.C. §1537 note.

The Court of International Trade held that section 609 prohibits the importation into the United States of shrimp from countries that do not require their shrimp trawls to protect sea turtles to at least the same extent as is required of United States shrimp vessels. The State Department's 1991 guidelines initially interpreted the statute in accordance with this meaning and in compliance with section 609(b), but limited enforcement and potential certification to fourteen Caribbean countries. However, various environmental groups were concerned at the State Department's limitation to Caribbean countries, and in 1994 the plaintiffs sued for broader enforcement of section 609. In 1995 the Court of International Trade held that the statute was not limited to the Caribbean area. *Earth Island Inst. v. Christopher*, 913 F. Supp. 559 (Ct. Int'l Trade 1995). Eleven Caribbean countries had been certified at the time of this ruling.

In 1996 the State Department changed its interpretation of section 609, apparently in response to trade-related objections. The Department issued new Guidelines, and no longer required that all of a nation's shrimp trawlers meet standards at least as rigorous as those imposed on shrimpers in United States waters. The 1996 Guidelines instead adopted shipment-by-shipment certification, which required only that the particular shrimp imported into the United States were harvested by a ship fitted with turtle exclusion devices (TEDs). Such shrimp could be imported, whether or not any other ship in the nation's shrimp fleet used turtle-protective devices. During this period four countries in Central America received full certification, as well as nations that harvest only cold water shrimp (beyond the range of sea turtles), and nations that use aquaculture or hand (artisanal) shrimp fishing methods.

In response to the 1996 Guidelines, the plaintiffs who had prevailed in 1995 filed a "motion to enforce" the Court of International Trade's judgment, challenging the shipment-by-shipment approach as contrary to section 609. The Court of International Trade agreed with the plaintiffs and enjoined the government from importing any shrimp or products from shrimp harvested in the wild by vessels of uncertified nations. *Earth Island Inst. v. Christopher*, 942 F. Supp. 597 (Ct. Int'l Trade 1996). International pressures increased at this time, including complaints that this interpretation of section 609 was in violation of the General Agreement on Tariffs and Trade (GATT). In 1998 this court reversed the injunction, finding that the Court of International Trade lacked jurisdiction to rule on the motion to enforce because the plaintiffs had withdrawn the motion. *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1356 (Fed. Cir. 1998). Following this court's decision, the State Department issued the 1998 Guidelines, reinstating the shipment-by-shipment approach; these are the guidelines at issue in this case.

The Court of International Trade in April 1999 again held that the State Department's interpretation of section 609 was incorrect. The court held that section 609(b)(2) limits section 609(b)(1) to shrimp from countries that meet the certification requirements of section 609(b)(2). The court explained that the statute requires country certification, not shipment-by-shipment certification as to the particular load of shrimp:

> [P]aragraph (1) of section 609(b) is specifically contingent upon the certification procedure established by section 609(b)(2), which offers the only congressionally-approved breaches of the embargo * * *.

Earth Island Inst. v. Daley, 48 F. Supp.2d 1064, 1081 (Ct. Int'l Trade 1999). The court further reasoned that:

> Paragraphs (b)(1) and (b)(2) are *pari materia*; they cannot be read independently, or out of the context adopted by Congress, including section 609(a) [instructing negotiations to protect sea turtles worldwide], to slow or stanch the extinction of species of sea turtles.

Id.

The issue is whether, contrary to this decision of the Court of International Trade, the State Department correctly interpreted section 609 as requiring no more than that the particular shipment to the United States was harvested using a TED. My colleagues on this panel so hold. However, neither the statutory text, its legislative purpose, its enactment history, nor its contemporaneous interpretation, supports this meaning.

The Legislative Purpose

It is not disputed that sea turtles are endangered by commercial trawl shrimping.[2] The decline in sea turtle populations throughout the world has been dramatic; for example, as of 1990 the Kemp's ridley turtle population had declined to less than one percent of its abundance in 1947. *See Decline of the Sea Turtles: Causes and Prevention*, 26 National Academy of Sciences 144 (1990). The acknowledged principal cause of sea

[2] Five sea turtle species are listed as endangered or threatened: the loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*).

turtle deaths is capture and drowning in shrimp trawl nets. In 1987 the National Marine Fisheries Service estimated that 11,179 sea turtles were killed in southeastern United States waters each year. United States trawlers harvest eight percent of the world's supply of shrimp. Sea turtles, however, roam in warm waters worldwide, and are endangered worldwide. Globally, it was estimated that 124,000 turtles were killed each year by commercial shrimp trawlers. *See Earth Island*, 913 F. Supp. at 568.

On this background, section 609 was enacted. The statute requires nations that wish to serve the United States market to adopt turtle-protective measures no less rigorous than those imposed on our own fleet; all trawl shrimpers in United States waters are required to use turtle exclusion devices. It is generally accepted that when some trawlers use turtle exclusion devices and others do not, the turtles escaped or excluded from the nets of one trawler are often caught by trawlers without TEDs. However, if all vessels in harvest areas use turtle exclusion devices, it is estimated that the devices release "97 percent of the turtles caught in shrimp trawls." *Sea Turtle Conservation; Shrimp Trawling Requirements*, 52 Fed. Reg. 24244, 24244 (June 29, 1987). These data led to the legislation as enacted, requiring that other countries, if their shrimpers wish to sell into the United States market, protect the turtles to the same extent as required for United States vessels. At the time of enactment it was well recognized that the purpose of the legislation was to protect sea turtles in their global habitat, while assuring that United States fishermen were not competitively disadvantaged. Both goals are served by the statute's requirement that nations whose shrimp fishers wish to sell to the United States must adopt fleet-wide turtle-protection devices, and not simply place such devices on selected ships. The Report of the Senate Committee on Appropriations explained the legislation as follows:

> It calls for a ban on imports of shrimp from any nation that: (1) fails to adopt a regulatory program for turtle protection which is comparable to that of the United States; and (2) has higher incidental catches of sea turtles than U.S. shrimpers.

S. Rep. No. 101–144, at 104 (1989). Similarly, after the Conference addition of section 609(b)(2)(C) providing that certification may be based on turtle-free shrimp fishing environments, the Conference Report of the House of Representatives explained the legislation as requiring

> a ban on importation of shrimp which have been harvested with commercial fishing technology which may adversely affect species of sea turtles subject to the regulations, not later than May 1, 1991, unless the President certifies to Congress that *the harvesting nation has adopted regulations governing the incidental taking of sea turtles in the course of shrimp harvesting comparable to regulations adopted by the U.S.*, that the average rate of the incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by U.S. vessels in the course of such harvesting or the particular fishing environment of the har-

> vesting nation does not pose a threat of the incidental taking of sea turtles in the course of such harvesting.

H.R. Conf. Rep. No. 101–299, at 84 (1989) (emphasis added). Neither of the legislative Reports indicates that Congress intended to adopt or accept merely a shipment-by-shipment approach to importation of shrimp.

The legislative record illustrates the congressional purpose of protecting these endangered animals worldwide, while avoiding any disadvantage to domestic shrimp fishing interests due to their obligatory use of TEDs.[3] The sponsor of section 609, Senator Breaux, explained:

> [T]he amendment I am offering today is intended to promote the international conservation of sea turtles, and to provide the groundwork for ensuring that foreign fishing interests bear as great a conservation burden as our own industry.

135 Cong. Rec. S8335, 8373–74 (daily ed. July 20, 1989). Senator Breaux further stated:

> [T]his amendment focuses on the role that other nations must play if we are to fulfill our goal of effective sea turtle conservation.

Id. at 8374. Senator Chafee also explained that the legislation

> serves to strengthen our Nation's commitment to protect endangered sea turtles from drowning in commercial shrimp nets.

Id at 8375. Senator Johnston also recognized that the legislation would create

> an effective protection first for sea turtles, and alternatively help for the price of shrimp for our shrimpers in Louisiana.

135 Cong. Rec. S12191, 12266 (daily ed. Sept. 29, 1989). Senator Johnston explained the commercial benefits as follows:

> What it will mean in practical terms, we think, if those countries do not take that action [to place TEDs on all vessels] the price of shrimp obviously will go up because the supply will be down, so that Louisiana shrimpers, Texas shrimpers, Florida shrimpers will in effect have some form of compensation in the form of higher prices for their shrimp should these countries fail to take that action.

Id. Senator Lott reiterated the idea that the legislation would

> make sure that the other countries are taking the same measures we are. We cannot have a situation where we impose requirements on our shrimpers that other countries do not have and then allow them to use the opportunity to export a flood of shrimp into our country to fill a void that may be left.

135 Cong. Rec. S8335, 8374. Senator Shelby described the conservation programs of other nations as a condition of access to the United States market:

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[3] At the time of enactment the concern was not the cost of a TED, which was as low as $200, but the possible reduction of the catch. The record states that experience has shown no significant reduction in catch, and indeed some ancillary advantages such as exclusion of debris and unwanted fish.

> If other countries are to share in the benefits of access to the $20 million U.S. market, I believe that these countries should be required to implement conservation programs comparable to that of the United States.

Id. at 8376.

There were no statements, during the extensive floor discussion, contrary to the uniform goal of protecting endangered sea turtles and avoiding disadvantage to United States shrimpers. A shipment-by-shipment approach not only weakens the incentive for countries to impose TED requirements, but it removes the anticipated "level playing field" for domestic interests, for all United States shrimpers are required to use TEDs. That the legislation was designed for country-by-country certification, not shipment-by-shipment, was reiterated by Senator Breaux:

> It is patently unfair on its face to say to the U.S. industry that you must abide by these sets of rules and regulations, but other countries do not have to do anything, and, yet, we will then give them our market. That is exactly what is happening. I think the amendment * * * is a good amendment. It will require other countries to do exactly what we are being required to do, and if in fact they do not, they will lose the U.S. market.

135 Cong. Rec. S12191, 12266. Senator Hollings made a similar statement in describing the legislation:

> It calls for a ban on imports of shrimp from any nation that: First, fails to adopt a regulatory program for turtle protection which is comparable to that of the United States, and second, has higher incidental catches of sea turtles than U.S. shrimpers.

Id. at 12207.

Senator Hollings, after the Conference with the House, explained the addition of section 609(b)(2)(C), that a country will be certified and its shrimp imports permitted when the "particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting." 135 Cong. Rec. S14389, 14391 (daily ed. Oct. 31, 1989). This amendment clarified that the ban on importation does not apply when a nation's shrimp are grown in aquaculture, or caught by hand line (artisanal) fishing, or by trawling in cold water that is not turtle habitat. This clause did not, however, authorize or accept the use of trawl methods that do not exclude the turtles. There is no support at all for the government's theory that section 609(b)(2)(C) adjusted the legislative purpose and permitted use of shrimp fishing technology that "may affect adversely such species of sea turtles" as long as the turtle-destroying shrimp catch is not sent to the United States market.[4]

[4] The panel majority states that it cannot see any difference between aquacultured or hand-caught shrimp and TED-caught shrimp. Aquacultured shrimp are farmed rather than caught in the open seas, with no risk to sea turtles. And hand caught shrimp do not pose a serious threat to sea turtles because of the short duration of tow times. *See Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 58 Fed. Reg. 9015, 9016 (Feb. 18, 1993). By contrast, mechanized commercial shrimp trawling constitutes a considerable threat to sea turtles, a threat that is not relieved when only some of the trawlers use TEDs.

Since United States shrimpers produce only eight percent of the world's shrimp catch, sea turtle protection was recognized as requiring a global effort. Although the panel majority's theory that "section 609 was not enacted with the primary goal of minimizing sea turtle deaths" is not supported by the legislative record, the alternative legislative goal of protecting the domestic industry is also disserved by permitting importation from nations whose other vessels do not carry turtle-exclusion devices. In addition, I do not agree with the majority that if there is a commercial aspect to legislation, the humanitarian purpose becomes irrelevant.

The Guidelines

For the first six years after enactment, the State Department interpreted section 609 as requiring an embargo of all shrimp from a nation that harvests shrimp in turtle habitat with at least some trawlers that do not use turtle exclusion devices. This interpretation was changed in the 1996 Guidelines. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

It cannot be disputed that when only some of the ships trawling for shrimp use TEDs, sea turtles that are saved by the TEDs may later be captured by the vessels without TEDs. The Commerce Department itself raised this concern. Rolland Schmitten, Fisheries Administrator for the National Marine Fisheries Service, wrote as follows:

> By requiring that TEDs be used only on those vessels that harvest shrimp for export to the U.S. market, sea turtles will be put at greater risk of incidental capture aboard non-TED equipped boats in a nation's fleet.
>
> This approach will also reduce the incentive for nations to adopt comprehensive national programs to reduce the incidental take of sea turtles * * * [and] may also result in some certified nations abandoning the comprehensive programs they now have in place or curtailing enforcement of such programs.

Letter from R. Schmitten to Mary Beth West, Deputy Assistant Secretary of State for Oceans (July 28, 1998).

Although the government argues that the State Department has discretion to interpret the statute, citing *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), in that case the Court held that the discretion exercised by the Secretary of Commerce for phased-in compliance with the national whale quota was "a reasonable construction of the language used in [the legislation]." *Id.* at 232. Here, the State Department's interpretation is not a reasonable construction of the statute, which clearly requires country-by-country, not shipment-by-shipment, certification. An agency's statutory interpretation cannot stand if it contravenes the clearly expressed legislative intent. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Board of Governors of Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986).

In its brief, the Secretary of State suggests that matters of international relations and trade pressures in the World Trade Organization (WTO) have warranted more circumspect handling than section 609 may have originally contemplated. The government also states that global turtle protection is proceeding, albeit slowly. However, this court is not authorized to evaluate a pragmatic political accommodation. We, like the Executive branch, are bound by the law as Congress enacted it.

The World Trade Organization Litigation

The government makes much of the recent resolution of the challenge to section 609 in the WTO. In 1996 Malaysia, Thailand, India, and Pakistan challenged the United States' implementation of section 609 as contrary to the GATT. The WTO Appellate Body held that this statute was within an exception to GATT rules in that it related to conservation, but held that various aspects of the certification guidelines were discriminatory. Eventually, in 2001, on a second suit brought by Malaysia, the State Department's 1999 Guidelines (which authorize shipment-by-shipment certification) were accepted as in harmony with the GATT.

The government states that the WTO rulings "support" the State Department's interpretation. The government describes these WTO rulings as "the law of nations" and states that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). However, no party asserts that WTO decisions have controlling status as United States law. The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreement Acts states that decisions of WTO panels and the WTO Appellate Body "have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy." H.R. Doc. No. 103–316, at 1032 (1994). The SAA also states:

> If a [WTO] report recommends that the United States change federal law to bring it into conformity with a Uruguay Round Agreement [including the GATT], it is for the Congress to decide whether any such change will be made.

Id. The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. §3512(d); *see also* 19 U.S.C. §3512(a)(1) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.").

Thus although the government appears to rely on the WTO ruling as requiring United States (and judicial) support of the current Guidelines, neither we nor the State Department has authority to rewrite the statute. *See Suramerica de Aleaciones Laminadas C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992) ("if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy"); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1366 (5th Cir. 1993) (the court must "give effect to Congress' intent, even if implementation of that intent is virtually certain to create a violation of the GATT").

I repeat, it is not before us to decide whether the State Department has pursued a path that is diplomatically preferable to that selected by the Congress. The government brief states that an increasing number of nations are requiring the use of TEDs for all their trawled shrimp. These salutary developments do not relieve the judicial obligation to implement the statutory text as Congress intended and enacted it. Thus I must, respectfully, dissent from the court's incorrect statutory interpretation.

NOVOSTEEL SA, PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE, AND BETHLEHEM STEEL CORP. AND U.S. STEEL GROUP, A UNIT OF USX CORP. (NOW KNOWN AS UNITED STATES STEEL LLC), DEFENDANTS-APPELLEES

Appeal No. 01–1274

(Decided March 26, 2002)

Pamela L. St. Peter, Edmund Maciorowski, P.C., of Bloomfield Hills, Michigan, argued for plaintiff-appellant. With her on the brief was *Edmund Maciorowski*.

Mark L. Josephs, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. On the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director; and *Velta A. Melnbrencis*, Assistant Director. Of counsel was *A. David Lafer*, Senior Trial Counsel. Of counsel on the brief were *John D. McInerney*, Chief Counsel for Import Administration; *Berniece A. Browne*, Senior Counsel; and *David W. Richardson*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, of Washington, DC.

Jennifer Danner Riccardi, Dewey Ballentine LLP, of Washington, DC, argued for defendants-appellees. With her on the brief were *Michael Stein*, *Bradford L. Ward*, and *Jon Avins*. Of counsel were *Rory F. Quirk*, and *Navin Joneja*.

Appeal from: United States Court of International Trade
Chief Judge GREGORY W. CARMAN

Before MICHEL, LOURIE and DYK, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MICHEL. Opinion dissenting in part filed by *Circuit Judge* DYK.

MICHEL, *Circuit Judge*.

Plaintiff-Appellant Novosteel SA appeals a decision by the United States Court of International Trade holding that antidumping and countervailing duty orders addressed to "cut-to-length carbon steel plate from Germany" applied to the steel "profile slabs" that Novosteel was importing from a German company called Reiner Brach. *Novosteel SA v. United States*, 128 F. Supp. 2d 720, 722 (Ct. Int'l Trade 2001). Specifically, the court determined that substantial evidence supported the scope determination by the Commerce Department that the two orders, as well as the initial sources of evidence used to interpret them (*i.e.*, the petitions for the orders and the initial determinations by Commerce and the International Trade Commission), did not unambiguously include or exclude the profile slab at issue. As a result, the court said, Commerce properly resorted to the five-part "*Diversified Products*" criteria to clarify the orders' scope. And the application of those criteria, the court concluded, showed that these two orders did indeed cover the Reiner Brach profile slab.

We affirm the judgment of the Court of International Trade. First, contrary to Novosteel's suggestions, the petitions that led to the issuance of the orders did not need to specifically identify the Reiner Brach profile slab in order to cover them; our precedent, to say nothing of the regulations, makes clear that neither a petition nor an antidumping or countervailing duty order requires that level of specificity. Similarly, the fact that neither the petitions nor the orders (called the "Plate Orders") listed the specific "HTSUS" (Harmonized Tariff Schedule of the United States) number assigned to the Reiner Brach profile slab does not mean that the Orders also unambiguously excluded this product. As a matter of law, a petition need not list the entire universe of products or the numbers assigned to them under the HTSUS in order to cover those products. And the petitions here, as more fully explained below, described the products covered by the Orders using "dimensional" criteria and other definitions; they did not define the scope of the requested Orders in terms of the HTSUS and thus did not purposefully limit themselves to the HTSUS products that the petitions did list. And so, the omission of the HTSUS number for Reiner Brach profile slab does not mean that the Orders necessarily excluded that product.

Next, we discern no reversible error with the definition that the court assigned to a disputed term ("flat-rolled") in the Orders. Novosteel, simply put, has not explained how the court's definition differs in any material respect from the definition that Novosteel asserts the court should have used—the HTSUS definition of "flat-rolled." Meanwhile, nothing in an earlier scope determination, *see Wirth Ltd. v. United States*, 5 F. Supp. 2d 968 (Ct. Int'l Trade 1998), indicates that the Commerce Department had to apply a certain meaning to the terms "flat-rolled" or "further worked" so that they could encompass only a set type, number and order of steel-production processes. And substantial evidence—including a brochure that the German exporter (Reiner Brach) used to describe its profile slabs—supports the finding that Reiner Brach could have had additional treatment or processes performed on its steel profile slab, *i.e.*, that it was possibly having this steel "further worked" within the meaning of the Orders, thereby justifying resort to the *Diversified Products* criteria. Last, by not raising an argument about the retroactive application of a scope determination until it filed its summary judgment reply brief, Novosteel has waived the right to have us address that argument in the first instance.

BACKGROUND

This case presents the question whether two related antidumping and countervailing duty orders addressed to a type of steel imported from Germany covered the steel "profile slab" that Plaintiff-Appellant Novosteel had imported for approximately four years.

A. THE PLATE ORDERS ISSUE IN 1993.

In the early 1990s, Bethlehem Steel and the other Defendant-Intervenors in this case filed petitions with officials of the Commerce Department asking that they investigate and issue antidumping and countervailing duty orders against certain cut-to-length steel imported into the United States from Germany. As with all such petitions filed with Commerce, Bethlehem Steel and the other domestic steel producers alleged that companies were importing and selling steel from Germany below cost and were thereby causing "material harm" to domestic steel sellers.

In their petitions, the Defendant-Intervenors did not specifically identify "profile slab," much less the profile slab exported by the German company Reiner Brach, as a product that fell within the scope of its petitions. In the section entitled "Scope of Investigation and Description of the Merchandise," the petitions instead refer to the dimensional characteristics of the steel covered by the requested Orders, as well as to definitions from the "American Iron and Steel Institute product categories" and the "American Society for Testing and Materials standards specification numbers." On one page, the petitions also refer to and quote (in a footnote) the definition of "flat-rolled products" according to the Harmonized Tariff Schedule of the United States. (J.A. 88 n.5) (quoting HTSUS, Chapter 72, Note 1(k)). Generally, however, the six pages devoted to the respective petitions' "description of merchandise" define the type of steel at issue with little reference to the HTSUS.

On the last page of this section, the petitions do list certain products according to the HTSUS classification numbers that the Customs Service had assigned to them. As the petitions themselves stated, products with these HTSUS numbers were "covered by [these] Petition[s]." The classification number "HTSUS 7207"—the number later assigned to Novosteel's imported profile slab—does not appear among them.

In August 1993, the Commerce Department, having investigated the Defendant-Intervenors' petitions, went ahead and issued both antidumping and countervailing duty orders directed to the importation of "cut-to-length carbon steel plate from Germany." The two orders, called the "Plate Orders," defined the products that they covered as:

> Certain hot-rolled carbon steel *flat-rolled products* in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness * * *.

58 Fed. Reg. 43,756, 43,758 (Aug. 17, 1993); 58 Fed. Reg. 44,170 (Aug. 19, 1993) (emphasis added). As with the earlier petitions, the Plate Orders did not list HTSUS 7207 as one of the products that they covered. The Orders did state, however, that the listing of classification numbers did not alone determine whether any particular product fell within their scope: "Although the Harmonized Tariff Schedule of the United States * * * subheadings are provided *for convenience and customs purposes, our written descriptions of the scope of these proceedings are dispositive*." *Id.* (emphasis added).

B. NOVOSTEEL IMPORTS REINER BRACH PROFILE SLAB FROM 1994 TO 1998.

In June 1994, Novosteel (through its wholly owned subsidiary Barzalex) began importing into the United States a type of steel called "profile slab" from Reiner Brach GmbH & Co. A few months earlier, Novosteel had obtained a ruling letter from the Customs Service that classified this profile slab under the "heading 7207, HTSUS." The heading signified that, in the view of the Customs Service, the profile slab constituted an "unfinished product of iron or non-alloy steel." In addition, because the 1993 Plate Orders did not specifically list HTSUS 7207, Customs did not require Novosteel to pay estimated antidumping or countervailing duties on this product at the time of entry. Novosteel proceeded to import Reiner Brach's profile slab for the next four years without having to pay any estimated import duties.

In June 1998, however, Customs officials informed Novosteel that a review of its import record showed that the Reiner Brach profile slab did indeed fall within the scope of the Plate Orders. Novosteel stopped importing the Reiner Brach profile slab in July 1998, though it "effectuated 14 entries" of this product between August 1998 and February 1999. Also in August 1998, Novosteel followed the advice given by Customs officials and requested a scope determination by the Commerce Department about whether the Plate Orders did indeed cover the Reiner Brach profile slab it was importing. *See* 19 C.F.R. § 351.225(c) (setting forth the procedures for obtaining a determination about the scope of an antidumping or countervailing duty order).

C. THE COMMERCE DEPARTMENT CONCLUDES THAT THE REINER BRACH PROFILE SLAB FALLS WITHIN THE SCOPE OF THE PLATE ORDERS.

In March 1999, Commerce issued its initial scope determination, finding that the Plate Orders did appear to cover the Reiner Brach profile slab. After the parties filed additional comments, Commerce concluded in May 1999 that, "based upon a review of the underlying record," the profile slab here did indeed constitute the kind of carbon steel covered by the Plate Orders. In so concluding, however, Commerce reasoned that neither the petitions' descriptions of the merchandise nor the initial investigations by Commerce and the International Trade Commission conclusively showed whether the Plate Orders applied here. Instead, said Commerce, its conclusion about whether the profile slabs were "flat-rolled" within the meaning of the Plate Orders rested on the application of the five-part *Diversified Products* criteria. *See* 19 C.F.R. § 351.225(k)(2) (1998) (setting forth criteria used to determine whether a particular product is covered by an antidumping or countervailing duty order when an examination of the petition, and the initial investigation and determinations of Commerce and the International Trade Commission "are not dispositive"); *Diversified Prods. Corp. v. United States*, 572 F. Supp. 883 (Ct. Int'l Trade 1983) (establishing the criteria mentioned above).

D. THE COURT OF INTERNATIONAL TRADE AFFIRMS.

Novosteel thereafter filed a complaint with the Court of International Trade challenging the rulings of the Commerce Department as unsupported by substantial evidence. Relying on the agency record compiled before Commerce, Novosteel then moved for summary judgment. *See* U.S. CIT R. 56.2.

In a thorough opinion, the Court of International Trade upheld Commerce's scope determination, denied Novosteel's summary judgment motion and entered judgment for the government. In particular, the court concluded that Commerce did properly resort to the *Diversified Products* analysis because, first, a review of the petitions and initial investigations did indeed fail to clarify whether the term "flat-rolled," as used in the Plate Orders, unambiguously included or excluded the Reiner Brach profile slab. Citing precedent, the court added that simply because the Orders did not explicitly identify the Reiner Brach profile slab itself did not mean that the Orders had also unambiguously excluded that product. *Novosteel*, 128 F. Supp. 2d at 726.

In a similar vein, the court rejected Novosteel's assertion that because the Plate Orders did not list HTSUS 7202 (the HTSUS number that Customs assigned to Reiner Brach profile slab) and because the "'[p]etitioners described the merchandise included within the order[s] * * * within the context of HTS[US] nomenclature,'" that omission, too, showed that the Orders unambiguously excluded the profile slab. *Id.* at 727 (quoting Novosteel's Summ. J. Br. at 7). According to the court, the petitions instead defined the covered merchandise by using criteria that had nothing to do with the HTSUS, including (for example) criteria relating to "dimensional measurements" and to definitions from the "American Iron and Steel Institute product categories" and the "American Society for Testing and Materials standards specification numbers." *Id.*

And while the petitions also described the subject merchandise by referring to HTSUS classification headings, the court discounted this HTSUS reference as simply a requirement of the regulations. *See id.*; *see also* 19 C.F.R. § 351.202(b)(5) (setting forth requirements for petitions that request the imposition of antidumping or countervailing duties, including requirement that a petition list "the subject merchandise * * * and its current U.S. tariff classification number"). In other words, the court implied that the regulations neither set forth a requirement that a petitioner list every single HTSUS classification number that a putative order might cover, nor define the terms it uses in a petition by reference to the HTSUS. *See Novosteel*, 128 F. Supp. 2d at 727–28. Commerce, moreover, stated in the Plate Orders themselves that it was providing these HTSUS headings "for convenience and customs purposes"; the written descriptions of the merchandise still controlled the scope of the Orders. *Id.* at 727.

The court proceeded to examine the definition of the subject merchandise that Commerce did ascribe to the Plate Orders. Specifically, the court agreed that the operative term used in the Plate Orders was "flat rolled" and that the petitions did define that term by reference to the HTSUS. The HTSUS, Note 1(k), in turn defines "flat-rolled" as "rolled products * * * which *do not conform* to the definition at [Note] 1(ij)." *Novosteel*, 128 F. Supp. 2d at 728 (emphasis added). HTSUS, Note 1(ij) sets forth a definition of "semi-finished products," saying it refers to products that "have not been *further worked* [other] than subjected to primary hot-rolling * * *." *Id.* (emphasis added). By implication, then, the HTSUS definition of "flat-rolled" referred to products that have been "further worked [beyond] * * * primary hot-rolling." *Id.*

The court then noted, however, that it was rejecting the argument that this HTSUS definition alone controlled the meaning of "flat-rolled," as the Plate Orders themselves used the term "flat-rolled" (not "further worked"). Instead, the court indicated that it would simply consider this HTSUS definition as one of the factors that would help clarify the meaning of that term. *Id.* at 728–29. Further, because neither party offered an unambiguous definition of "further worked," *see id.* at 729, the court relied on a common dictionary definition of the term "further worked," just as it had done in another case involving the "further worked" language. *Id.* (citing *Winter-Wolff v. United States*, 996 F. Supp. 1258, 1265 (Ct. Int'l Trade 1998)). Ultimately, then, the court defined "further worked" as meaning to "subject an existing product to some process of development, treatment or manufacture beyond primary hot-rolling." *Id.*

Given that definition, the court next held that "[f]ive pieces of evidence" supported Commerce's finding that Reiner Brach profile slab could have possibly undergone some additional process or treatment, *i.e.*, could have been "further worked," and that a final determination about the Orders' coverage thus required application of the *Diversified Products* criteria. *Id.* at 729–32. Most prominently, the sales brochure that Reiner Brach distributed to U.S. customers indicated as follows: that the company intended to use its profile slabs "to augment the shrinking supply of very expensive thick plate [*i.e.*, flat-rolled steel] on the world steel markets," (J.A. 758); that Reiner Brach "has, over the years, worked closely with its liquid steel producers to melt cleaner and better steel," (*id.*); that it uses "[u]ltrasonic testing * * * manually on each finished slab to provide [Reiner Brach's] customers with internal integrity assurance," (*id.*); and that it uses a "*hydraulic press as well as a five roll flattening machine*" to guarantee "*[f]latness within close tolerances*," (J.A. 759) (emphasis added). In addition, Novosteel's brief evidently admitted that Reiner Brach had its steel profile slab produced at a "facility 'commonly described as a two high reversing mill,'" a mill used to manufacture the type of plate or flat-rolled steel covered by the Plate Orders. *Novosteel*, 128 F. Supp. 2d at 729 (quoting Pl.'s Br. at 3).

After concluding that this evidence supported Commerce's finding that the Plate Orders did not unambiguously include or exclude this product, the court then applied the *Diversified Products* criteria to the other relevant evidence, *e.g.*, a survey about the tolerances for Reiner Brach profile slab, various responses by Novosteel to Commerce's questionnaires, a specification guide showing that one could have the profile slab substituted for plate steel in certain applications, excerpts from a treatise, documents and other evidence indicating that Reiner Brach had changed its name and had attempted to sell profile slabs to its existing customers for cut-to-length plate, the information contained in Reiner Brach's sales brochure, etc. *Id.* at 732–38. In the end, the court determined that the Plate Orders did apply to the Reiner Brach profile slab. Nothing in the court's opinion addresses the issue whether Novosteel should have to pay the estimated antidumping duties for the profile slab it imported for four years without penalty, *i.e.*, whether imposition of duty payments for those years would have an impermissible retroactive effect. Novosteel, however, did not present this argument in its summary judgment briefing until it filed its reply brief.

E. NOVOSTEEL'S ARGUMENTS ON APPEAL.

Reduced to its essentials, Novosteel's appeal appears to present six issues for our consideration. First, Novosteel seems to suggest that because the Plate Orders did not specifically identify Reiner Brach profile slab, the Commerce Department and the Court of International Trade strayed beyond a "bright line" by construing the Orders so that they did encompass its steel profile slab. Second, we alternatively construe Novosteel's broad argument here to mean that, because the Orders speak in terms of the HTSUS and because those Orders also failed to list the HTSUS number for the Reiner Brach profile slab (HTSUS 7207), they must also unambiguously exclude this HTSUS number (and, of course, the profile slab covered by that HTSUS number). Third, Novosteel intimates that Commerce erred by not adopting the HTSUS definition of "flat-rolled," though it has not explained why this HTSUS definition differs in any significant way from the definition actually used by Commerce and the court.

Fourth, in Novosteel's view, Commerce and the court erred because they deviated from a definition of "further worked" that Commerce had rendered in another scope determination without offering any reasons for that deviation. Fifth, pointing to the agency record generally and the Reiner Brach brochure specifically, Novosteel suggests that substantial evidence does not support Commerce's scope determination because the brochure cited by the agency and the court showed only a "capability" of having the steel profile slab "flat-rolled"; no evidence, according to Novosteel, shows that Reiner Brach actually went about exercising this capability. Last, Novosteel presents the same argument that it did not raise with the Court of International Trade until it filed its summary judgment reply brief; namely, that Commerce was impermissibly applying its scope determination to more than four years' worth of imports of Reiner Brach profile slab. We address each of these arguments in turn.

Discussion

In so doing, we use the same standard of review that the Court of International Trade uses when reviewing scope determinations by the Commerce Department: whether substantial evidence supports Commerce's determination and whether that determination accords with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997); *Nitta Indus. Corp. v. United States*, 997 F.2d 1459, 1460 (Fed. Cir. 1993). Substantial evidence consists of evidence that a "reasonable mind might accept as adequate to support a conclusion." *Gerald Metals, Inc.*, 132 F.3d at 720. In addition, we also give "due respect" to the "informed opinion of the Court of International Trade." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994). Applying this deferential standard of review, we affirm the court's judgment.

A. The Petition for the Plate Orders Did Not Unambiguously Exclude the Profile Slab.

To begin with, the description of the merchandise contained in the petitions does not show that the Plate Orders unambiguously excluded the Reiner Brach profile slab, contrary to Novosteel's assertion. The "Commerce Department enjoys substantial freedom to interpret and clarify its antidumping orders. But while it may interpret those orders, it may not change them." *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995); *accord Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990).

The applicable regulations explain how Commerce will determine "whether a particular product is included within the scope of an [antidumping or countervailing duty] order." 19 C.F.R. § 351.225(k). First, Commerce will examine the "descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary [of Commerce] and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1). Note that, in setting forth the "descriptions of the merchandise contained" in its petition, *see id.*, a petitioner (like Bethlehem Steel) need not "circumscribe the entire universe of articles" that might possibly fall within the order it seeks. *Nitta Indus.*, 997 F.2d at 1464; *accord Wirth*, 5 F. Supp. 2d at 976 (stating that the "'absence of a reference to a particular product in the Petition does not necessarily indicate that the product is not subject to an order'") (citation omitted). Indeed, the regulations themselves recognize that Commerce must conduct scope determinations in the first place because the "descriptions of the subject merchandise * * * must be written in *general terms*." 19 C.F.R. § 351.225(a) (emphasis added).

Second, if a review of these initial criteria does not definitively resolve whether an order covers a particular product, Commerce must then consider the five *Diversified Products* criteria. These criteria consist of the "physical characteristics of the [subject] product," the "expectations of the ultimate purchasers," the "ultimate use of the product," the "channels of trade in which the product is sold," and the "manner in which the product is advertised and displayed." 19 C.F.R. §§ 351.225(k)(2)(i)—(v).

In this case, no language in the petitions unambiguously excludes the Reiner Brach profile slab from the scope of the Plate Orders. Indeed, as the Court of International Trade noted, the Orders did expressly list some of the products not covered by the Orders; but Reiner Brach profile slab was not among them. Nor has Novosteel identified any language in any of the sources (the petitions and the initial determinations by Commerce and the ITC) used to initially construe those Orders that would exclude its imported product. In short, then, Novosteel's first argument seems to rely on a proposition that Commerce (via regulation) and the courts have roundly rejected—the proposition that a petition must expressly and specifically identify all the products covered by the order at issue. *See* 19 C.F.R. § 351.225(a); *Nitta Indus.*; *Wirth*, *supra*. For these reasons, we reject it here as well.

B. Antidumping/Countervailing Duty Orders and the HTSUS.

Liberally construing Novosteel's argument about the allegedly unambiguous scope of the Orders, we also conclude that the petitions' omission of the HTSUS number assigned to Reiner Brach profile slab does not strengthen Novosteel's appeal. As stated above, Novosteel claimed before the Court of International Trade that the petitions requesting the Plate Orders spoke of the relevant steel product in "HTSUS nomenclature"; and thus, the argument goes, the listings of the HTSUS classification numbers in the petitions actually defined the entire realm of products covered by the Plate Orders.

This argument fails for several reasons. For one thing, as the Court of International Trade explained, the petitions hardly defined the scope of the products in terms of the HTSUS; rather, they described the products covered by the Orders using "dimensional" criteria and references to non-HTSUS sources, *e.g.*, definitions from the "American Iron and Steel Institute" and the "American Society for Testing and Materials," in addition to references to the HTSUS. The HTSUS references, in other words, by no means dominated the petition so as to make that petition synonymous with the HTSUS listings themselves. The Plate Orders themselves make this point clear, saying that they were providing the HTSUS listings for "convenience and customs purposes" only and that the petitions' description of the merchandise still controlled the Orders' scope.

Our precedent has likewise indicated, meanwhile, that a reference to an HTSUS number "is not dispositive" about the scope of an antidumping or countervailing-duty order. *See Smith Corona*, 915 F.2d at 687. So too has the precedent from the Court of International Trade. *See Wirth*, 5 F. Supp. 2d at 977–78 ("The inclusion of various HTSUS headings in a petition ordinarily should not be interpreted to exclude merchandise * * * classified under an HTSUS heading not listed in the petition."), *aff'd*, 185 F.3d 882 (Fed. Cir. Feb. 2, 1999) (Table). We have no reason to now cast aside those precedents as something less than controlling in this case.

At the same time, we recognize that one of the applicable regulations does state that petitions must contain (among other things) a "detailed description of the subject merchandise that defines the requested scope of the investigation, *including * * * its current U.S. tariff classification number.*" 19 C.F.R. § 351.202(b)(5) (emphasis added). But as the Court of International Trade also implied, that regulation does not in turn say that the failure to include a particular HTSUS number within a petition means the resulting Order will likewise exclude the product that is designated under that particular HTSUS classification number. *Compare Wirth*, 5 F. Supp. 2d at 977 (rejecting argument that the regulations required a dispositive listing of all HTSUS numbers and concluding that the HTSUS list alone did not constitute the entirety of products covered by the petition or the order that followed). More important, Novosteel has not challenged the court's implicit interpretation of the regulation as either erroneous or as somehow offending (or exceeding) the statute from which it derives. We see no reason to make the argument for them. Further, we doubt that any argument to that effect would survive close scrutiny, given again that the regulations also contemplate the need to draft the scope of these orders "in general terms." *See* 19 C.F.R. § 351.225(a).

C. The Court's Definition of "Flat-Rolled" versus the HTSUS Definition of "Flat-Rolled."

We need not comment on whether Commerce or the court used the proper methodology to arrive at a definition for "flat-rolled," the operative term at issue, or whether they should have relied solely on the HTSUS definition of that term. Even assuming that Novosteel has squarely presented this question for our review, it has nevertheless failed to explain how the HTSUS definition of "flat-rolled" differs in any material respect from the "flat-rolled" definition actually used by the court.

As noted in the court's opinion, HTSUS defines "flat-rolled" by contrasting it with another definition ("semi-finished"); thus, "flat-rolled" means products that are *not* "other products of a solid section, which *have not been further worked [other] than subjected to primary hot-rolling* * * *." *Novosteel*, 128 F. Supp. 2d at 728 (citations omitted) (emphasis added). Stated differently, HTSUS defines "flat-rolled" to refer to products that, in addition to "primary hot-rolling," have also been "further worked." The Court of International Trade, meanwhile, ultimately defined "flat-rolled" as meaning to "subject an existing product to some process of development, treatment or manufacture beyond primary hot-rolling."

As we see it, this definition looks every bit the same as the HTSUS definition. Novosteel has not even compared these two definitions, much less explained why they differ and why that difference should change the judgment of the court and the Commerce Department. At most, then, the ruling of the court here, even assuming it is error, amounts to nothing more than harmless error, *see* U.S. CIT R. 61.

D. Nothing in the Wirth Decision Purports to Control the Definition of "Further Worked" (or "Flat-Rolled").

The Court of International Trade has held that Commerce must either act in accord with its prior, similar scope determinations or else provide "rational reasons for deviating" from them. *Springwater Cookie & Confections, Inc. v. United States*, 20 CIT 1192, 1196 (Ct. Int'l Trade 1996). Citing this principle, Novosteel asserts that Commerce (and the court) erred because Commerce had allegedly defined "further worked" in another, similar scope determination (*see Wirth*) so that that term encompassed only a distinct set of steel-making processes; and that, in this case, Commerce disregarded the definition in *Wirth* without explaining why.

For purposes of this appeal, we assume without holding that the controlling principle is the principle laid down in *Springwater Cookie*. But as the Court of International Trade here reasoned, nothing in either its *Wirth* decision or in the underlying *Wirth* scope determination suggests that Commerce could assign only one meaning to the term "further worked" or, more important, to the term actually used in the Plate Orders, "flat-rolled," so as to limit those terms to a distinct and ordered set of processes only. Accordingly, while the scope determination in *Wirth* and the scope determination here share some similarities, *e.g.*, *Wirth* addressed the applicability of antidumping orders directed to cut-to-length carbon steel plate from Brazil, none of those similarities compels a contrary conclusion about the definition of "further worked," "flat-rolled" or the processes that they could and could not include.

E. The Reiner Brach Sales Brochure.

Given our deferential standard of review, we also uphold Commerce's finding that Reiner Brach could possibly have had additional treatment done on its profile slabs so as to have that steel product "flat-rolled," *i.e.*, "further worked." As noted, the Court of International Trade and Commerce both largely based this finding on the brochure that Reiner Brach had admittedly circulated to its U.S. customers. This finding, moreover, led Commerce and the court to conclude that an examination of the initial criteria (the petitions and the initial investigations by Commerce and the ITC) did not definitively resolve whether the Plate Orders included or excluded this particular product; and thus, that application of the *Diversified Products* criteria was necessary.

Mindful of the low threshold needed to show that Commerce here justifiably found an ambiguity, we agree that Reiner Brach's sales brochure, along with the admission that Reiner Brach produces its steel at a "two high reversing mill," provide the requisite substantial evidence. Most significant, the brochure states that Reiner Brach guarantees its steel meets strict "*flatness * * * tolerances*" and that a "*hydraulic press as well as five roll flattening machine are employed to back up this guaranty.*" (J.A. 759) (emphasis added). These statements alone could lead one to reasonably infer that, indeed, Reiner Brach uses equipment to produce "flat-rolled" steel, *i.e.*, steel that it had "further worked" beyond the hot-rolling process.

As if to strengthen that point, the brochure adds that the profile slab "augment[s] the shrinking supply of * * * thick plate"—*i.e.*, flat-rolled steel—in the world. And that Reiner Brach undertakes certain processes in order to produce "very thick profiling slabs of superior internal integrity," as shown by the "ultrasonic testing * * * performed manually on each finished slab to provide our customers with internal integrity assurance." Reasonably construed, a fact finder could read these other statements to confirm that Reiner Brach may indeed have undertaken processes to help refine and test its steel (*i.e.*, to "further work" its steel) and to thereby produce "profiling slabs of superior internal integrity." This inference is further bolstered by the admission that Novosteel apparently made in its brief about Reiner Brach having its profile slab produced at a "two high reversing mill," a mill that is capable of producing the type of steel covered by the Plate Orders.

In a sense, a short brochure might seem like a slender reed on which to base a scope determination, especially one in which the appellate record alone includes more than 1300 pages. After all, one might think that the government or the Defendant-Intervenors could have had an expert (or several experts) examine one of Reiner Brach's profile slabs and determine one way or the other whether the steel exhibited signs of additional treatment or processes beyond primary hot rolling. Or that an expert could have examined other evidence, like the Reiner Brach brochure, and concluded that the statements in that brochure showed that the steel profile slab was "flat-rolled" within the technical meaning of that term.

But the final scope determination here did not actually turn on this brochure; the Commerce Department and the Court of International Trade instead considered the brochure's statements for the limited purpose of determining whether the Orders unambiguously included or excluded the Reiner Brach profile slab, thereby necessitating resort to the *Diversified Products* criteria and the record evidence addressed to those criteria, *e.g.*, a survey about the tolerances for Reiner Brach profile slab, the various admissions, answers to questionnaires and other information provided by Novosteel itself, a specification guide and treatise, as well as the information contained in Reiner Brach's sales brochure, etc. (Novosteel, unsurprisingly, does not challenge the court's thorough analysis under these latter criteria.) Further, other reasonable fact finders might just as well consider this brochure the proverbial smoking gun, an admission that Reiner Brach produces the very kind of "flat-rolled" steel covered by the Plate Orders.

In any event, our court of course plays a limited role in reviewing determinations by the Commerce Department. And so, even assuming we might find differently if we had to make these findings in the first instance, we obviously have no authority to do so now. *See Gerald Metals, Inc.*, 132 F.3d at 719–20 (reiterating the substantial-evidence standard of review as whether a reasonable mind might accept the evidence in the record as sufficient to support a conclusion). Nor do we think it necessary (or even justifiable) to scrutinize the record for other evidentiary arguments that Novosteel could have squarely presented but nevertheless did not, *e.g.*, that the "flatness" or the "five roll flattening machine" referred to in the Reiner Brach brochure means something different than the "flat-rolled" used in the Orders themselves. In the end, therefore, we cannot conclude that the brochure here constitutes something less than substantial evidence. Thus, we affirm the judgment with respect to this ruling, too.

F. Waiver and the Retroactive Imposition of Antidumping Duties.

The last issue raised by Novosteel is whether Commerce could retroactively apply the Plate Orders, as construed in its scope determination, to the profile slab that Novosteel had imported for four years without paying estimated duties. Novosteel, however, failed to preserve this issue for our review, for it waived this retroactivity argument by not presenting it in the principal summary judgment brief filed with the Court of International Trade. *See Viskase Corp. v. Am. Nat'l Can Co.*, 261 F.3d 1316, 1326, 59 USPQ2d 1823, 1830 (Fed. Cir. 2001) (noting that appellate courts "only rarely" will entertain "evidence and issues * * * not properly raised in proceedings below"). Raising the issue for the first time in a reply brief does not suffice; reply briefs *reply* to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court's consideration. Further, the non-moving party ordinarily has no right to respond to the reply brief, at least not until oral argument. As a matter of litigation fairness and procedure, then, we must treat this argument as waived.

Novosteel, understandably enough, has tried its best to circumvent waiver, saying that it raised the question (as indeed it did) before the Commerce Department and that it alluded to the retroactivity argument in the complaint filed with the Court of International Trade (though only the most strained reading of the complaint would justify that latter assertion). But the sources it cites are irrelevant for waiver purposes. A party does not preserve or waive an issue based on the arguments it presented to an administrative agency; a party merely exhausts that issue before the agency so as to give a court the proper basis to review that issue on appeal or via a complaint. *See, e.g.*, *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998). Similarly, a party does not waive an argument based on what appears in its pleading; a party waives arguments based on what appears in its brief.

So, given that Novosteel did not present its retroactivity argument to the Court of International Trade until after it had filed its principal summary judgment brief, and given that parties must give a trial court a fair opportunity to rule on an issue other than by raising that issue for the first time in a reply brief, we conclude that Novosteel has indeed waived this argument for purposes of our review.

CONCLUSION

For the reasons stated above, the judgment of the Court of International Trade is

AFFIRMED.

United States Court of Appeals for the Federal Circuit

DYK, *Circuit Judge*, dissenting in part.

The appellant's briefs are virtually awash in frivolous or unmeritorious arguments, which are properly rejected by the majority. However, I fear that the appellant's single meritorious argument has been lost in the shuffle.

On appeal to this court, the Department of Commerce ("Commerce") does not claim that the product is clearly within the 1993 antidumping and countervailing duty orders ("Plate Orders"); it asserts only that the Plate Orders are ambiguous, making resort to the *Diversified Products* criteria appropriate. The appellant disagrees, urging that the Plate Orders are not ambiguous and that its products are not within the scope of the Plate Orders. In my view, the disagreement here is not about the scope of the Plate Orders. Rather, Commerce has simply failed to make the necessary factual investigation to determine whether the product is within the agreed scope of the Plate Orders. In my view, the majority errs in concluding that the ambiguity in the Plate Orders is established by ambiguity in the present record. I do not think that the inadequacy in the present record makes the Plate Orders ambiguous.

I

Our decisions with respect to scope orders have established three propositions: (1) that Commerce has discretion to interpret its scope orders, *see Ericsson GE Mobile Communications, Inc v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995); (2) that Commerce cannot construe its scope orders to include products that are outside those orders, *see Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990); and (3) that if a scope order is ambiguous, Commerce can resort to the *Diversified Products* criteria to determine whether the product is within the order, *see id.*

All parties appear to assume that the relevant question under the Plate Orders here is whether appellant's product is "flat-rolled" within the meaning of the Orders, 58 Fed. Reg. 43,756 (Aug. 17, 1993); 58 Fed. Reg. 44,170 (Aug. 19, 1993), and that "flat-rolled" is properly construed by reference to Harmonized Tariff Schedule of the United States ("HTSUS"), Chapter 72, Note 1(k), which in turn refers to HTSUS, Chapter 72, Note 1(ij).[1] Thus, the parties assume that the question of whether appellant's product was "flat-rolled" depends on whether appellant's product was "further worked." I also agree that the Court of International Trade properly defined "further worked" as "to subject an existing product to some process of development, treatment, or manufacture beyond primary hot-rolling." *Novosteel SA v. United States*, 128 F. Supp. 2d 720, 729 (Ct. Int'l Trade 2001) (citing *Winter-Wolff, Inc. v. United States*, 996 F. Supp. 1258, 1265 (Ct. Int'l Trade 1998)).

II

Commerce's conclusion as to whether the products were "further worked" was far from clear. In the *Preliminary Scope Determination*, Commerce stated that "it is not clear whether the Reiner Brach profile slabs qualify as flat-rolled products covered by the Plate Orders. To answer this question, we examined the *Diversified Products* criteria enumerated in section 351.225(k)(2)." *Preliminary Scope Determination Regarding Profile Slabs—Antidumping and Countervailing Duty Orders on Certain Cut-to-Length Carbon Steel Plate from Germany*, U.S. Department of Commerce Internal Memorandum from Roland MacDonald to Joseph Spetrini, at 5 (March 23, 1999) ("*Preliminary Scope Determination*"). However, in the *Final Scope Determination* under review, Commerce concluded that "record evidence indicates that Reiner Brach profile slabs are indeed further processed, and thus do not fall within the definition of excluded products at Note 1(ij) * * *." *Final Scope Determination Regarding Profile Slabs—Antidumping and Countervailing Duty Orders on Certain Cut-to-Length Carbon Steel Plate from Germany*, U.S. Department of Commerce Internal Memorandum from Roland MacDonald to Joseph Spetrini, at 4 (May 18, 1999) ("*Final Scope Determination*").

[1] Note 1(k) defined "flat-rolled" as "rolled products * * * that do not conform to the definition at [Note] 1(ij)." Note 1(ij) defined "semi-finished products" as products that "have not been further worked [other] than subjected to primary hot-rolling * * *." In light of the parties' agreement, I do not reach the question of whether the use of the definition of "flat-rolled" provided in the notes is appropriate.

Apart from evidence that Novosteel was able to manufacture its profile slabs within close flatness tolerances, the evidence of "further working" was (1) Reiner Brach's sales brochure, which explicitly stated that "[a] hydraulic press as well as a five roll flattening machine are employed to back up this guaranty" of "[f]latness within close tolerances;" and (2) ultrasonic testing which suggested that its profile slabs were sold as finished products. *See Final Scope Determination* at 7–8. At oral argument in this court, the government did not rely on the flatness tolerances as showing "further working" and conceded that the ultrasonic testing (item 2) itself did not constitute "further working." With respect to the hydraulic press and the five-roll flattening machine (item 1), Commerce urged at oral argument that these machines showed the "capab[ility]" to engage in "further working."

III

There is no substantial evidence in this record to support a finding that the appellant's product was "further worked." The majority appears to agree, stating:

> In a sense, a short brochure might seem like a *slender reed* on which to base a scope determination, especially one in which the appellate record alone includes more than 1300 pages. After all, one might think that the government or the Defendant-Intervenors *could have had an expert* (or several experts) examine one of Reiner Brach's profile slabs and determine one way or the other whether the steel exhibited signs of additional treatment or processes beyond primary hot rolling. Or that *an expert could have examined other evidence*, like the Reiner Brach brochure, and concluded that the statements in that brochure showed that the steel profile slab was "flat-rolled" within the technical meaning of that term.

Ante at 19 (emphases added).

To be sure, as I discuss below, there is evidence that the product *might have been* "further worked," but that is not evidence of "further working." It is well established that speculation does not constitute "substantial evidence." As the Supreme Court noted in *Bowen v. American Hospital Ass'n*: "Agency deference has not come so far" that agency action is upheld "whenever it is possible to 'conceive a basis' for administrative action." 476 U.S. 610, 626 (1989); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order * * *. There must be such a responsible finding."). Under these circumstances, Commerce's conclusion that there was evidence of "further working" necessarily falls.

IV

The majority appears to sustain Commerce on a ground not articulated by the agency—that the uncertainty as to "further working" renders the Plate Orders ambiguous. Quite apart from its apparent failure to abide by the *Chenery* rule, barring affirmance of agency decisions based on new arguments by counsel, 318 U.S. at 95, the majority's theory is, I think, incorrect. The majority states that "the Commerce Department and the Court of International Trade * * * considered the brochure's statements for the limited purpose of determining whether the Orders unambiguously included or excluded the Reiner Brach profile slab * * *." *Ante* at 19–20. To support its conclusion that Commerce properly found an ambiguity, the majority cites evidence of possible "further working" by noting that "Reiner Brach *could possibly* have had additional treatment done on its profile slabs so as to have that steel product 'flat-rolled,' *i.e.*, 'further worked.'" *Id.* at 18 (emphasis added). The majority further states that Commerce

> could read these other statements [in the brochure regarding the market for the profile slabs and the ultrasonic testing] to confirm that Reiner Brach *may indeed have undertaken* processes to help refine and test its steel * * *. This inference is further bolstered by the admission that Novosteel apparently made in its brief about Reiner Brach having its profile slab produced at a "two high reversing mill," a mill that is *capable of* producing the type of steel covered by the Plate Orders.

Id. at 19 (emphases added).

The *possibility* that these products were "further worked" does not render the Plate Orders ambiguous. In other words, the existence of an inadequate record concerning the characteristics of these products does not create an ambiguity as to the scope of the Plate Orders. We should not approve an approach under which Commerce can simply fail to investigate, and then declare a resulting ambiguity as to whether a product is within the scope of an order. In light of this skeletal record, the appropriate recourse is to remand this case to Commerce for a determination of the "further working" issue on an adequate record.

For the foregoing reasons, I respectfully dissent in part.

FORD MOTOR CO., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01–1052

(Decided April 12, 2002)

Charles J. Cooper, Cooper, Carvin & Rosenthal, PLLC, of Washington, DC, argued for plaintiff-appellant. With him on the brief was *David H. Thompson*. Of counsel on the brief were *Steven H. Becker*, *Paul A. Horowitz*, and *Scott D. Shauf*, Coudert Brothers, of New York, New York. With them on the brief was *Paul Vandevert*, Ford Motor Company, of Dearborn, Michigan.

Amy M. Rubin, Attorney, Civil Division, Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were *Stuart E. Schiffer*, Deputy Assistant Attorney General, and *David M. Cohen*, Director. Of counsel on the brief was *Sheryl A. French*, General Attorney, Office of Assistant Chief Counsel, United States Customs Service, of New York, New York.

Appealed from: United States Court of International Trade
Chief Judge GREGORY W. CARMAN

Before RADER, SCHALL, and BRYSON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SCHALL. Dissenting opinion filed by *Circuit Judge* BRYSON.

SCHALL, *Circuit Judge*.

Ford Motor Company ("Ford") appeals the final decision of the United States Court of International Trade that sustained the denial, by the United States Customs Service ("Customs"), of Ford's protest concerning the liquidation of certain entries of merchandise. *Ford Motor Co. v. United States*, 116 F. Supp. 2d 1214 (Ct. Int'l Trade 2000) ("*Ford II*"). In its decision, which followed a trial, the court held that Customs' three extensions, under 19 U.S.C. § 1504(b),[1] of the one-year time period for liquidating the entries under 19 U.S.C. § 1504(a) were legally permissible. The court rejected Ford's contention that the extensions were unreasonable and that consequently the entries were "deemed liquidated" pursuant to section 1504(a) at the rate of duty asserted by Ford upon entry between December of 1985 and February of 1986, rather than at the rate of duty determined by Customs in December of 1989. Because we conclude that Ford established at trial that Customs' delay in liquidating the entries was unreasonable, we reverse and remand the case to the Court of International Trade for entry of judgment in favor of Ford.

BACKGROUND

I.

The relevant facts are set forth in our previous opinion in this case, *Ford Motor Co. v. United States*, 157 F.3d 849 (Fed. Cir. 1998) ("*Ford I*"). They are as follows:

Ford operates an assembly plant in Louisville, Kentucky, at which it manufactures both cars and trucks using imported foreign engines and transmissions. *See Ford I*, 157 F.3d at 852. In 1983, Ford applied to establish a Foreign Trade Subzone ("FTSZ") at the plant, pursuant to 15 C.F.R. §§ 400.600–603.[2] Ford's application was approved, and an FTSZ was established at the Louisville plant. The Louisville FTSZ operated between November of 1985 and February of 1986. *Ford I*, 157 F.3d at 853.

An FTSZ is an area inside the United States that may receive treatment under the Customs laws as a territory outside the United States. *See generally*, 15 C.F.R. § 400.1(c) (2000). At an FTSZ, an importer has the "choice of paying duties either at the rate applicable to the foreign material in its condition as admitted into a zone, or if used in manufac-

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[1] Unless otherwise indicated, all statutory citations are to the 1982 version of the United States Code, the relevant provisions of which were in effect, or equivalent to the provisions in effect, during the period of time pertinent to this case.

[2] Unless otherwise indicated, all regulation citations are to the 1985 version of the Code of Federal Regulations, the relevant provisions of which were in effect, or equivalent to the provisions in effect, during the period of time pertinent to this case.

turing or processing, to the emerging product." *Ford I*, 157 F.3d at 852; *see also Armco Steel Corp. v. Stans*, 431 F.2d 779, 782 (2d Cir. 1970).

During the relevant time period, the duty rate published in the Tariff Schedules of the United States for cars imported into the United States was 2.6% *ad valorem*, while the duty rate for imported trucks was 25% *ad valorem*. The duty rate for engines and transmissions for both cars and trucks was 3.3%. Under these circumstances, the optimal exploitative strategy for Ford was to import engines and transmissions into the Louisville FTSZ, and then segregate those utilized to assemble cars from those utilized to assemble trucks. Ford planned to treat the segregated car parts as "foreign merchandise" (viewing the plant as being on foreign soil). It then would pay the 2.6% duty on the emerging "imported" car. At the same time, Ford planned to treat the segregated truck parts as "domestic merchandise" (viewing the plant as being on United States soil). It then would pay the 3.3% duty rate on the "imported" engines and transmissions, thereby avoiding the 25% duty rate for completed trucks.

Regulations that were in effect required that Ford conduct its FTSZ operations in a certain manner. First, it had to identify each part entering the Louisville FTSZ as either a car part or a truck part. Ford then had to designate all car parts as "non-privileged foreign" merchandise and all truck parts as "privileged domestic" merchandise on a Customs Form 214 ("214 form"). *See* 19 C.F.R. § 146.12(a). To designate merchandise as either "non-privileged foreign" or "privileged domestic," the importer checks a box on the 214 form that is labeled with the corresponding designation. *See* 19 C.F.R. §§ 146.31, 146.32.

Duties on "non-privileged foreign" merchandise are not due and payable until the merchandise leaves the FTSZ. *See* 19 C.F.R. § 146.48(e); *see also* 19 C.F.R. § 146.23. Thus, Ford could defer payment of duties on car transmissions and engines until it had installed them in completed cars. In that way, Ford could capture the duty rate for cars (2.6%) rather than car parts (3.3%). Duties for "foreign domestic" merchandise, however, are due and payable upon entry of the merchandise into the FTSZ. *See* 19 C.F.R. § 146.22(a); *see also* 19 C.F.R. § 146.44. Thus, the regulations required that Ford pay the duty on engines and transmissions to be installed in trucks as they entered the FTSZ. In short, in order to operate the Louisville FTSZ in accordance with the applicable regulations, Ford had to determine and designate the future usage of each part. Then, based on that usage, Ford had to identify the correct FTSZ status for the part and make duty payments at the proper time.

During the three months it operated the FTSZ at its Louisville plant, Ford received eleven entries of merchandise from abroad. The merchandise consisted of transmissions and engines that Ford used in the manufacturing of vehicles. Apparently through error, however, Ford made incorrect entries with respect to the merchandise on the required 214 forms. Specifically, Ford's agent at the Louisville FTSZ designated each transmission and engine in the eleven entries it received at the

FTSZ between December of 1985 and February of 1986, including those labeled as truck parts, as "non-privileged foreign." Consequently, to the extent it intended to treat any of the entries as "privileged domestic," Ford failed to pay duties associated with these parts, as required by the governing regulations. *See* 19 C.F.R. § 146.22; *Ford I*, 157 F.3d at 853. Ford's 214 forms also were "replete with errors" regarding product descriptions, duty rates, and tariff item numbers. *Ford II*, 116 F. Supp. 2d at 1218.

Ford reported its 214 form error to Customs. As a result of Ford's failure to designate the engines and transmissions destined for trucks as "privileged domestic," and therefore pay the applicable 3.3% *ad valorem* duty rate upon entry of the parts into the FTSZ, Customs asserted that the parts exited the FTSZ (and thus entered the United States) as parts of completed trucks and were thus subject to a 25% *ad valorem* duty. *Ford I*, 157 F.3d at 853.

In due course, Customs Agent Richard McNally began an investigation to determine the proper amount of duty that was due. In July of 1986, McNally prepared an initial internal report in which he concluded that the designations in Ford's 214 forms "had been improper, that the proper duty rate on the truck parts was 25%, and that Ford owed approximately $5.3 million in additional duties." *Id.* at 854. Further, citing the "significant amount of duty involved," McNally referred the case to Customs' Office of Enforcement/Investigation for a possible fraud investigation. *Ford II*, 116 F. Supp. 2d at 1218. In August of 1986, pursuant to 19 U.S.C. § 1592,[3] Customs initiated a civil fraud investigation, which continued until at least March of 1990.

Pursuant to 19 U.S.C. § 1504(a), an entry of merchandise that is not liquidated within one year of the date of entry is deemed liquidated at the rate of duty asserted upon entry by the importer, unless the period for liquidation is extended under 19 U.S.C. § 1504(b). On the basis of the ongoing fraud investigation, Customs issued three one-year extensions of the statutory one-year liquidation deadline. The extensions were issued on or about October 22, 1986, mid-to-late October of 1987, and October 18, 1988. *Ford II*, 116 F. Supp. 2d at 1219 n.3. Eventually, on December 1, 1989, Customs liquidated the eleven entries with a 25% duty on all parts asserted to be truck parts in the entries. The total additional duty amounted to approximately $ 5.3 million. *Ford I*, 157 F.3d at 854. It appears from the record that Customs completed its fraud investigation around March of 1990. *Id.*

Ford timely protested the liquidations, contending, *inter alia*, that the eleven entries of engines and transmissions were deemed liquidated by operation of law at the rate asserted on importation, which (as far as the parts asserted to be truck parts were concerned) was 3.3%. Ford argued that Customs had not shown that "information needed for the proper

[3] Section 1592(a)(1) proscribes the entry of merchandise into the United States "by fraud, gross negligence, or negligence." The section further provides for procedures for conducting investigations of fraud, gross negligence, and negligence in the entry of merchandise, as well as the penalties that result from violations.

appraisement or classification of the merchandise [was] not available to the appropriate customs officer" to justify the three extensions under 19 U.S.C. § 1504(b)(1). After Customs denied the protest, Ford paid the assessed duties and initiated an action in the Court of International Trade to challenge the liquidations pursuant to 28 U.S.C. § 1581(a). *Ford I*, 157 F.3d at 854. On cross-motions for summary judgment, the court rejected Ford's claim, holding that, as a matter of law, the ongoing fraud investigation justified Customs' issuance of the three extensions before liquidating the entries. *Ford Co. v. United States*, 979 F. Supp. 874 (Ct. Int'l Trade 1997).

II.

Ford appealed the Court of International Trade's grant of summary judgment to this court, which analyzed whether Ford had presented sufficient evidence to raise a genuine issue of material fact regarding the propriety of Customs' successive extensions that delayed liquidation. In so doing, we interpreted 19 U.S.C. § 1504(b)(1) as requiring both that the investigation allegedly justifying the extension be reasonably expected to produce information regarding appraisement or classification and that Customs seek that information in a reasonable amount of time. *Ford I*, 157 F.3d at 856–57. Applying that standard and construing the evidence in a light most favorable to Ford, we held (1) that "the record does not show that the fraud investigation was reasonably expected to produce information about 'appraisement' and 'classification'" and (2) that "even if Customs expected the investigation to turn up information relevant to appraisement and classification, that expectation alone cannot justify summary judgment," since "the length of the fraud investigation is subject to scrutiny for reasonableness." *Id.* at 857. Accordingly, we vacated the judgment of the Court of International Trade and remanded for a consideration of the propriety of Customs' extensions and delayed liquidation.

III.

Pursuant to our remand instructions, the Court of International Trade conducted a three-day trial, during which it heard testimony from numerous witnesses with knowledge of Customs' fraud investigation and the decisions to extend the liquidation deadline under 19 U.S.C. § 1504(b)(1). The court held that Ford had failed to establish either that Customs did not reasonably expect the investigation to uncover information regarding classification and appraisal or that Customs did not act reasonably in pursuing that information over a period of three and a half years. *Ford II*, 116 F. Supp. 2d at 1236, 1240. Accordingly, the court determined that Customs' extensions and delayed liquidation complied with 19 U.S.C. § 1504; it therefore entered judgment in favor of the

United States. *Id.* at 1247.[4] Ford timely appealed the court's final decision. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

ANALYSIS

I.

As in effect during the relevant period, section 1504 provided in pertinent part as follows:

> (a) **Liquidation.** Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year * * * shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer * * *
>
> (b) **Extension.** The Secretary may extend the period in which to liquidate an entry * * * if—
>
> > (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer; * * *

19 U.S.C. § 1504(a), (b). In *St. Paul Fire & Marine Insurance, Co. v. United States*, 6 F.3d 763, 768 (Fed. Cir. 1993), we acknowledged that Customs possesses broad discretion concerning whether a liquidation extension is warranted under 19 U.S.C. § 1504(b)(1). *See also* 19 U.S.C. § 3 (providing that "the Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports as he shall judge best."). As a result of that discretion, and "the presumption of regularity [that] presume(s) that the import specialist properly performed [his] duties," *St. Paul*, 6 F.3d at 769, Ford bore a heavy burden in attempting to demonstrate that Customs abused its discretionary authority by issuing the liquidation extensions that are at issue.

We review the Court of International Trade's conclusions of law *de novo*. *Bestfoods v. United States*, 260 F.3d 1320, 1323 (Fed. Cir. 2001). Following a trial, we review the court's findings of fact for clear error. *See Better Home Plastics Corp. v. United States*, 119 F.3d 969, 971 (Fed. Cir. 1997); *Casio, Inc. v. United States*, 73 F.3d 1095, 1097 (Fed. Cir. 1996). The clear error standard requires us to accept the Court of International Trade's findings of fact unless we are left with a "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Inwood Labs., Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). Whether Customs abused its discretion either in extending the liquidation deadline under 19 U.S.C. § 1504(b)(1) or in pursuing its fraud investigation under 19 U.S.C. § 1592 is a question of fact. *See St. Paul*, 6 F.3d at 768.

II.

On appeal, Ford challenges the rulings of the Court of International Trade regarding both issues remanded by this court in *Ford I*. Specifically, Ford argues that Customs abused its discretion by issuing three

[4] The Court of International Trade rejected Ford's argument that its failure to pay duties before entering the truck engines constituted a correctable clerical error under 19 U.S.C. § 1520(c)(1)—a ruling that Ford does not challenge on appeal. *Id.* at 1241–46.

successive extensions of the statutory liquidation deadline under 19 U.S.C. § 1504(b)(1). According to Ford, the fact that Customs was conducting a fraud investigation under 19 U.S.C. § 1592 did not justify the extensions, since Customs failed to identify a single piece of information "needed for the proper appraisement or classification of the merchandise." 19 U.S.C. § 1504(b)(1). Further, Ford contends, irrespective of whether Customs reasonably expected to uncover such information, the Court of International Trade erred in deeming Customs' efforts in pursuing the fraud investigation reasonable. Ford interprets the trial testimony as revealing an investigation characterized by unjustifiable delays and prolonged periods of inactivity. For that reason, Ford argues that the manner in which the investigation was conducted fell well short of this court's requirement that "Customs [take] a reasonable amount of time to seek" the information related to classification and appraisement. *Ford I*, 157 F.3d at 857. For its part, the government argues that Customs enjoys wide discretion and a presumption that it acted reasonably in conducting the investigation. *See St. Paul*, 6 F.3d at 769. Further, the government contends that the delay in the investigation was justified by its complexity, the heavy caseloads of the agents conducting the investigation, and the diversion of the agents' resources necessitated by the opening of a new Customs office in Bowling Green, Ohio.

Our review in this case has been greatly aided by the Court of International Trade's careful and thorough findings of fact with respect to what occurred between August of 1986, when Customs commenced the fraud investigation, and December of 1989, when it liquidated the eleven entries of motor vehicle transmissions and engines that are at issue. Not surprisingly, neither Ford nor the government challenges those findings of fact. What the parties do dispute are the Court of International Trade's two ultimate findings of fact: that Customs did not abuse its discretion in extending the deadline for liquidation on account of its reasonable belief that it would adduce information relating to classification or appraisal in the fraud investigation; and that Customs took a reasonable amount of time to pursue that information in its investigation. Ford argues that the court erred with respect to both ultimate findings. We agree with Ford on the second point, for we conclude that irrespective of whether Customs reasonably expected the fraud investigation to produce information relating to classification or appraisal, Customs' delay in pursuing the fraud investigation and its resulting delay in liquidating the entries were not reasonable. In other words, while we accept all of the Court of International Trade's operative findings of fact, we respectfully part company with the court on the ultimate conclusion to be drawn from those facts.[5]

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[5] Our disposition of the case, of course, renders moot the question of whether Customs reasonably believed that the section 1592 investigation would produce information relevant to liquidation.

III.

The eleven entries at issue entered the FTSZ at various times between December of 1985 and February of 1986. The last entry occurred on February 7, 1986, so that the regular one-year period for liquidating all eleven entries at issue would (absent any extensions) have expired, pursuant to 19 U.S.C. § 1504, one year after that date. As noted above, Customs began its fraud investigation in August of 1986 after receiving Agent McNally's referral the previous month. McNally issued the first extension of liquidation in October of 1986.

After reviewing the evidence adduced at trial, the Court of International Trade concluded that Ford had "not demonstrated that the amount of time consumed [by the section 1592 investigation] was unreasonable." *Ford II*, 116 F. Supp. 2d at 1239. The court first considered the progress of the fraud investigation under the auspices of Special Agent George Fritz, from its inception in August of 1986 until November of 1987, when the matter was reassigned to Special Agent Charles Kyle, a period of approximately 16 months. During that time, Fritz conducted a series of interviews related to the investigation—the last of which occurred on March 4, 1987. *Id.* The Court of International Trade acknowledged that in the eight months between that interview and the transfer of the investigation to Agent Kyle, "it does not appear Fritz conducted additional activities on the case." *Id.* However, the court declined to equate such inactivity with an abuse of Customs' discretion in conducting the investigation, in light of Fritz's "other commitments and time constraints," including other investigations and absences for sick leave, that "limited his ability to work on the case." *Id.* The second extension of liquidation was issued in October of 1987, during this period of inactivity. *Id.* at 1219 n.3.

After concluding that Customs conducted the section 1592 investigation reasonably under Agent Fritz, the Court of International Trade turned to the progress of the investigation under Agent Kyle. Agent Kyle was responsible for the investigation from November of 1987 through its completion in March of 1990. It was during this period, in October of 1988, that McNally issued the third and final extension of liquidation. *Id.* at 1219 n.3, 1238–39. It also was during this period that Customs eventually liquidated the eleven entries at issue in December of 1989.

During Kyle's first month leading the investigation, he familiarized himself with the file and determined that, in order to complete the inquiry, he needed to gather additional information and to conduct interviews with various Customs personnel. *Id.* at 1238. However, after that initial determination was made, the investigation lay dormant for over fourteen months, until Kyle met with Fritz and McNally in February of 1989. Thereafter, Agent Kyle conducted several interviews and ultimately completed the investigation around March of 1990. *Id.* at 1240.

Agent Kyle testified that he was unable to complete the investigation more quickly because he was awaiting information he had requested from McNally—who had referred the Ford case for investigation. Kyle also testified that he could not complete the investigation until he interviewed four or five additional witnesses. *Id.* at 1225. He further testified that he was delayed in completing the investigation by his heavy workload, which included 25–50 cases and responsibilities attendant to setting up a new Customs office in Bowling Green. *Id.* at 1239. These responsibilities included "hiring and training staff, obtaining furniture and equipment, and handling all administrative" tasks of the new office. *Id.* Kyle's supervisor, Robert Cortesi, testified that the delay in conducting the Ford investigation was reasonable, in view of Kyle's workload. The Court of International Trade agreed. *Id.* at 1239–40.

Having reviewed the record, we are unable to agree with the Court of International Trade's ultimate finding: that Customs did not act unreasonably in terms of the amount of time it took to complete the section 1592 fraud investigation.

The fraud investigation consumed a total of 44 months, from August of 1986, when it was opened, until March of 1990, when it was completed. During that period, liquidation was delayed for approximately 36 months, from the initial one-year statutory deadline that (without any extensions) would have lapsed (for the first entry) in December of 1986, until Customs finally liquidated the entries in December of 1989. Significantly, during the 16 months when Agent Fritz was conducting the investigation, (August of 1986—November of 1987), he devoted hardly any time to the inquiry, and he performed no work on it during the latter half of his tenure (March of 1987—November of 1987). *Ford II*, 116 F. Supp. 2d at 1039. Moreover, after the case was transferred to Agent Kyle in November of 1987, aside from reviewing the progress of the investigation with his supervisor, Kyle performed virtually no substantive work on the investigation in the fourteen months between December of 1987 and February of 1989, when he met with Agents Fritz and McNally.

Though Customs enjoys wide discretion in liquidating entries, that discretion is not unbridled. *St. Paul*, 6 F.3d at 768; *Ford I*, 157 F.3d at 857. Even accepting the Court of International Trade's view of the evidence, in which Agent Fritz's sick time, Agent Kyle's responsibilities in starting the Bowling Green Office, and the workload carried by both agents delayed the fraud investigation, we cannot escape the conclusion that both the manner of conducting the investigation and the length of the investigation were unreasonable. Simply put, the first 30 months of the 44-month investigation (August of 1986—February of 1989) saw almost no substantive work and two periods of inactivity totaling 22 months (March of 1987—November of 1987 and December of 1987—February of 1989). It was during that 30-month period that Customs issued all three extensions of liquidation under section 1504(b)(1).

We do not hold that, in times of natural or national calamity, repeated extensions of liquidation and periods of inactivity could not withstand judicial scrutiny for reasonableness. Customs' delay in this case did not occur in such a setting, however. Rather, Customs sought to explain its delay in conducting the fraud investigation by pointing to typical day-to-day workplace exigencies, such as competing responsibilities, an agent taking sick leave, and the various tasks associated with starting a new office. Acceptance of these exigencies as excuses for Customs' lengthy delay in this case would leave the statutory objective of prompt liquidation, and this court's requirement that any liquidation delays be reasonable, largely meaningless. *See* 19 U.S.C. § 1504; *Ford I*, 157 F.3d at 856–57. Put another way, were we to hold that Customs did not abuse its discretion in issuing the three extensions of liquidation at issue in this case, we would be setting an unacceptably low bar for reasonableness. Accordingly, we hold that Ford proved by a preponderance of the evidence that the length of Customs' investigation and the manner in which Customs conducted the investigation were unreasonable. Consequently, liquidation of the eleven entries at issue was not properly extended under 19 U.S.C. § 1504(b)(1). As a result, the entries must be deemed liquidated under 19 U.S.C. § 1504(a).

CONCLUSION

For the foregoing reasons, the decision of the Court of International Trade in favor of the United States is reversed. The case is remanded to the court for entry of judgment in favor of Ford.

REVERSED AND REMANDED

BRYSON, *Circuit Judge*, dissenting.

I respectfully dissent. While I share the majority's concern about the lengthy delays in the investigation of this case, I would not reverse the trial court's decision that, under all the circumstances, the delay was not shown to be unreasonable.

By statute, Customs is accorded broad discretion to obtain extensions for up to four years to liquidate entries. 19 U.S.C. § 1504(b). An extension need not be applied for; rather, Customs may unilaterally obtain extensions of the one-year statutory liquidation period if "the information needed for the proper appraisement or classification of the merchandise, or for insuring compliance with applicable law, is not available to the Customs Service" or if the importer requests the extension. This court has made clear that Customs enjoys very broad discretion in determining whether to seek extensions as long as the total pre-liquidation period does not exceed four years. *See St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767–68 (Fed. Cir. 1993) (discussing in detail the statutory and regulatory design for obtaining extensions of liquidation). This court set out the governing standard in *St. Paul*, the leading decision on this point:

> Customs may, for statutory purposes and with the requisite notice, employ up to four years to effect liquidation so long as the exten-

> sions it grants are not abusive of its discretionary authority. Such an abuse of discretionary authority may arise only when an extension is granted even following elimination of all possible grounds for such an extension. There is, in sum, a narrow limitation on Customs' discretion to extend the period of liquidation.

6 F.3d at 768.

The Court of International Trade in this case held a three-day trial and subsequently wrote a lengthy opinion in which it analyzed in detail the circumstances surrounding the extensions obtained by Customs in this case. For reasons set forth in its opinion, the court concluded that Ford had not met its burden of showing that the amount of time consumed by the investigation was unreasonable; the court therefore held that this case did not fall within the "narrow limitation" on Customs' discretion to obtain extensions of the time for liquidating the subject entries.

The trial court examined the conduct of the two agents who were principally responsible for the investigation during the period in which the three extensions were obtained. With respect to the period August 1986 through November 1987, when the investigation was assigned to Agent Fritz, the trial court noted that "there was activity on the case from the time the case was assigned to Fritz in August 1986 at least through March 4, 1987, when Fritz interviewed Art Trussell, the former Louisville Port Director." The fact that there was no apparent activity on the case for the following eight months, the court explained, "does not show the inactivity was necessarily unreasonable." Rather, the court noted that the evidence showed that Agent Fritz "had other commitments and time constraints which limited his ability to work on the case," including being assigned to other investigations, working as the sole staff at the new Bowling Green office for a 30-day period, and being out on sick leave at the time the investigation was transferred. Based on the evidence adduced at trial, the court concluded that "the time it took Fritz to conduct the Ford investigation, given Fritz's overlapping obligations, cannot be found by this Court to be unreasonable."

The court likewise examined the period between November 1987 and October 1988, when the third extension was obtained. During that period, Agent Kyle was in charge of the investigation. Again, based on the evidence at trial, the court found that the period of delay was not unreasonable. During that period, the court noted, Agent Kyle was waiting for information from another Customs agent, and he also needed to interview four or five witnesses. It was not unreasonable that Agent Kyle failed to conduct those interviews earlier, the court concluded, "as he had a heavy caseload and had numerous responsibilities in connection with setting up the Bowling Green office during the time in which he was assigned to the case."

The question whether Ford satisfied its burden of establishing that the particular periods of delay were unreasonable under all the circumstances is intensely factual. The majority acknowledges that we must uphold the trial court's finding on the issue of reasonableness unless the trial court was clearly erroneous in reaching that conclusion. I do not believe Ford has satisfied that standard in this case.

In overturning the trial court's conclusion that the investigative delay in this case was not unreasonable, the majority focuses on the two lengthy periods of inactivity in the investigation—the eight-month period between March and November 1987, and the 11-month period between November 1987 October 1988. The majority does not accept the trial court's conclusion that those periods of inactivity were reasonable in light of the competing workload commitments, administrative burdens, and sick leave taken by the agents responsible for the investigation.

That is where I part company with the majority. While long periods of inactivity in an investigation certainly raise questions whether the investigation is being pursued with diligence, the mere fact that there are long periods of inactivity does not render the ensuing delay unreasonable. Presumably, the majority would have been more prepared to find the delays in this case excusable if the agents had taken some investigative steps from time to time rather than doing nothing on the investigation for lengthy periods. The problem is that some work lends itself to being done piecemeal, and some does not. In my view, a delay is not necessarily unreasonable if a busy agent who has many investigations to conduct puts a particular investigation at the end of his queue and does not begin to work on it for an extended period of time.

While it is surely not ideal to have lengthy delays built into an administrative system because of workload levels, it is not unusual. Competing demands are a fact of life, particularly in an investigative bureaucracy in which each agent has multiple investigative responsibilities. In such a setting, investigators often find that it is more efficient to postpone working on one matter until another is completed, rather than attempting to work on multiple matters simultaneously. Nor is this phenomenon peculiar to investigative agents. Others with heavy workloads, such as busy lawyers (and, indeed, even busy judges), often postpone beginning work on particular matters until other matters with more pressing deadlines or earlier spots in the work queue have been completed. For that reason, the fact that no work is done on a particular matter for an extended period of time, or that there are long workload-related periods of delay during which no progress is made on a particular project, does not mean that the delay is unreasonable.

Of course, if Ford had persuaded the trial court that the lack of progress on the investigation was the result of indolence or inattention on the part of the agents or the Customs Service generally, that would be a different matter. But the trial court concluded after hearing three days of evidence in this case that the agents' competing obligations and other factors provided an adequate explanation for the lengthy periods of delay. Because I do not think the trial court committed clear error in that regard, I would affirm.

ALLEGHENY LUDLUM CORP., AK STEEL CORP. (FORMERLY ARMCO, INC.), BUTLER ARMCO INDEPENDENT UNION, J&L SPECIALTY STEEL INC., NORTH AMERICAN STAINLESS, THE UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, AND ZANESVILLE ARMCO INDEPENDENT ORGANIZATION, PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01–1223

(Decided April 19, 2002)

Kathleen W. Cannon, Collier Shannon Scott, PLLC, of Washington, DC, argued for plaintiffs-appellants. With her on the brief were *R. Alan Luberda* and *David A. Hartquist*.

Neal J. Reynolds, Attorney, Office of General Counsel, U.S. International Trade Commission, of Washington, DC argued for defendant-appellee. With him on the brief were *Lyn M. Schlitt*, General Counsel, and *James M. Lyons*, Deputy General Counsel.

Appealed from: United States Court of International Trade
Judge EVAN J. WALLACH

Before LOURIE, CLEVENGER, and GAJARSA, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

Allegheny Ludlum Corporation, AK Steel Corporation, Butler Armco Independent Union, J&L Specialty Steel Inc., North American Stainless, The United Steelworkers of America, AFL/CIO/CLC, and Zanesville Armco Independent Organization (collectively "Allegheny"), appeal from a decision of the United States Court of International Trade affirming a Final Determination of the International Trade Commission that the U.S. steel industry was not materially injured by imports of stainless steel coiled plate from Belgium and Canada. Because the Final Determination is flawed as to each of the three statutory factors the Commission is obligated to consider, the decision of the Court of International Trade to affirm is improper. For this reason, we vacate and remand.

I

Under the statutory scheme established by the Tariff Act of 1930, as amended, American industries may petition for relief from imports that are sold in the United States at less than fair value ("dumped"), or which benefit from subsidies provided by foreign governments. 19 U.S.C. § 1675b (2000). The International Trade Commission ("Commission") is charged with determining whether the imported merchandise in question either materially injures or threatens to materially injure American domestic industry. As part of this material injury analysis, the Commission is obligated to delineate the relevant domestic industry by making a "domestic like product" determination, assessing which domestic product most closely corresponds to the imported merchandise in question. 19 U.S.C. §§ 1677(4), (10).

In 1998, responding to a petition for relief by the domestic steel industry, the Commission commenced an anti-dumping inquiry directed towards imported merchandise consisting of stainless steel plate in coils.

Following a determination by the Department of Commerce ("Commerce") that the imports were indeed being dumped onto the American market, the Commission evaluated whether these products materially injured domestic industry.

In the preliminary phase of the investigation, concluded in May 1998, the Commission found a single domestic like product, namely "certain stainless steel plate in coils." However, in its Final Determination, issued in May 1999, the Commission reached a different conclusion, determining that two domestic like products corresponded to the relevant imports: 1) hot-rolled steel coiled plate and 2) cold-rolled steel coiled plate. The Commission determined that all stainless steel plate in coils fell in one of these two categories.[1] These products differ in their qualities and uses. Cold-rolled plate is thinner and has a smoother finish than hot-rolled plate, and is used in applications such as food processing, beer-making, and dairy containers. In contrast, hot-rolled plate is used in articles such as equipment and storage tanks. As cold-rolled plate requires additional processing, it is more costly than hot-rolled plate. Over 99.9 percent of domestic steel plate production is hot-rolled plate. Because it found hot and cold-rolled steel plate to be two distinctly different products, the Commission considered separately whether the respective domestic industries producing them had been injured by the subject imports of stainless steel plate in coils. The Commission determined that while the domestic hot-rolled steel plate industry had indeed been materially injured by the subject imports, the domestic cold-rolled steel plate industry had not.

Before the Court of International Trade, Allegheny challenged both the Commission's determination that hot- and cold-rolled steel plate constituted separate domestic like products, as well as the Commission's finding that the domestic cold-rolled steel plate industry suffered no material injury as a result of the imported merchandise.

The Court of International Trade affirmed the Commission's Final Determination. *Allegheny Ludlum Corp. v. United States*, 116 F. Supp. 2d 1276 (Ct. Int'l Trade 2000). The Court found that substantial record evidence supported the determination that hot- and cold-rolled steel plate constituted separate domestic like products. *Id.* at 1287–88. As to the determination of no material injury, the Court of International Trade found the Commission's analysis legally flawed as to each of the three factors, volume, price, and impact, that 19 U.S.C. § 1677(7)(B) directs the Commission to consider.[2] *Id.* at 1288–1307. The Court of International Trade determined that the Commission had grounded its Final Determination of no material injury on an additional basis, that the domestic industry exhibited a "lack of interest" with regard to the market

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[1] The Commission's Final Determination applied only to stainless steel plate in coils, expressly excluding stainless steel plate not in coils. For ease of discussion, we will refer to the product as "steel plate" or "plate."

[2] Despite stating that the "Commission's 'volume' analysis was in accordance with law and supported by substantial evidence," *Allegheny*, 116 F. Supp. 2d at 1289, the Court of International Trade expressly noted that it evaluated substantial components of the volume analysis under other sections of the opinion. *Id.* at 1293. Common findings of error are consequently attributable to the volume analysis as well.

for cold-rolled steel plate. *Id.* at 1303. Evidence to this effect consisted in large part of statements made by industry representatives before the Commission that cold-rolled steel plate represented an almost negligible market in which domestic manufacturers had no plans to participate. The Court of International Trade affirmed the Final Determination, notwithstanding the errors in the remainder of the Commission's analysis, finding the evidence of the industry's lack of interest sufficient to sustain the overall finding of no material injury. *Id.* at 1307–8.

On appeal to this court, Allegheny challenges only the portion of the decision of the Court of International Trade affirming the Commission's finding of no material injury as to the domestic cold-rolled steel plate industry.

II

We review the Commission's conclusions of law *de novo*. *United States Steel Group v. United States*, 96 F.3d 1352, 1356 (Fed. Cir. 1996).

We review the Court's evaluation of Commission factual determinations by stepping into the shoes of the Court and duplicating its review, *Taiwan Semiconductor Indus. Ass'n v. Int'l Trade Comm'n*, 266 F.3d 1339, 1343–44 (Fed. Cir. 2001), evaluating whether Commission determinations are unsupported by substantial evidence or otherwise not in accordance with law. 19 § U.S.C. 1516a(b)(1)(B)(i); *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997).

III

Section 1677(7)(A) defines material injury as "harm which is not inconsequential, immaterial, or unimportant." Section 1677(7)(B) sets forth the factors the Commission is to evaluate in making its material injury determination. It provides that the Commission:

> (i) shall consider—
>
> (I) the volume of imports of the subject merchandise,
>
> (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States; and
>
> (ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

19 U.S.C. § 1677(7)(B) (2000).

Allegheny asserts that the Commission's analysis of each of the mandatory factors of subsection (i) is unsupported by substantial evidence or otherwise legally incorrect. Specifically, Allegheny contends that the Commission's analysis of both the volume and impact factors employs a faulty interpretation of 19 U.S.C. § 1677(4)(D), while the Commission's analysis of price is unsupported by substantial evidence. Further, Allegheny asserts that the Court of International Trade erred in affirming, despite the errors, the Commission's Final Determination on the basis of the industry's lack of interest in the cold-rolled market, a factor not present in the statutory language cited above. We address each of these contentions in turn.

IV

Both the price and impact components of section 1677(7)(B)(i) key the Commission's material injury determination to an evaluation of the effect of the imported merchandise on the domestic market for the relevant domestic like product. The "product line provision" of the statute provides an exception to this general rule if necessary data is lacking. This provision directs that the effect of subject imports "shall be assessed in relation to the United States production of a domestic like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer's profits." 19 U.S.C. § 1677(4)(D) (2000). In the alternative:

> If the domestic production of the domestic like product has no separate identity in terms of such criteria, then the effect of the [imports] shall be assessed by the examination of the production of the narrowest group or range of products, which includes a domestic like product, for which the necessary information can be provided.

Id. The Commission resorted to this alternative, explaining in the Final Determination that:

> Because the domestic industry was unable to provide segregated trade and financial data for cold-rolled stainless steel coiled plate, pursuant to the production line provision of 19 U.S.C. § 1677(4)(D), we also assess the effect of the cumulated subject imports on the production of the narrowest group of products that includes cold-rolled plate for which the necessary information could be provided—in this case, all stainless steel coiled plate.

Tension exists between the product line provision and the mandatory volume-price-impact analysis of section 1677(7)(B). To the extent that the Commission is entitled to rely on data from a broader category in the absence of specific information from a narrow subcategory, the relevant material injury analysis can be shifted.[3] Any actual effect of the imported goods on the narrower domestic like product market may be effectively submerged, and lost, upon the inclusion of data from a larger set of domestic products.

We need not fully explore this latent conflict here. Section 1677(4)(D) clearly contemplates the use of product line data as a matter of last resort, when the relevant like product data is simply nonexistent. The statutory language provides that this product line provision is to be

[3] Indeed, the case at bar provides a good example of this, as the Commission has assessed the effect of the subject imports against the entirety of the domestic stainless steel plate market, rather than against the 0.01% of that market which comprises cold-rolled steel plate.

employed when production of the domestic like product "has no separate identity." Further, the relevant Senate report reads:

> In examining the impact of imports on the domestic producers comprising the domestic industry, the ITC should examine the relevant economic factors (such as profits, productivity, employment, cash flow, capacity utilization, etc.), as they relate to the production of only the like product, if available data permits a reasonably separate consideration of the factors with respect to production of only the like product. *If this is not possible because, for example, of the accounting procedures in use or practical problems in distinguishing or separating the operations of product lines*, then the impact of the imports should be examined by considering the relevant economic factors as they relate to the production of the narrowest group or range of products which includes the like product and for which available data permits separate consideration.

S. Rep. 96–249, at 83–84 (1979) reprinted in 1979 U.S.C.C.A.N 381, 469–70 (emphasis added). These situations are cases in which the domestic like product data is actually unavailable, rather than those in which it is simply difficult to obtain.

The Court of International Trade has previously required the Commission to actively attempt to obtain relevant data before resorting to the product line provision. In *Babcock & Wilcox Co. v. United States*, 521 F. Supp. 479 (Ct. Int'l Trade 1981) *vacated, as moot*, 4 Ct. Int'l Trade 3 (1982), a domestic producer of steel pipes and boiler tubes initiated an anti-dumping complaint against certain Japanese manufacturers. The Commission rendered a negative material injury determination. *Id.* at 482. On appeal to the Court of International Trade, the domestic manufacturer alleged that the Commission had improperly relied on overbroad data for the entire seamless stainless boiler tube industry. The United States, defending the Commission's findings, asserted that such reliance was proper, under section 1677(4)(D), as the several products the plaintiff sought to have investigated had no separate identity. As one commissioner noted, while specific data was available on shipments, exports, and imports for each of the categories of pipe and tube products under investigation, only the petitioner was able to provide profit and loss data on each of these products. *Id.* at 483.

The *Babcock* court found that despite the fact that the Commission's findings stated that all but one of the domestic producers were unable to furnish the Commission with profit information, there was nothing in the record to indicate that the Commission had ever solicited such profit data from domestic producers other than the petitioner. Finding that the Commission, "should have sought such data from the other domestic producers comprising the boiler tube and pipe industry before moving to the broader industry," *id.* at 485, the Court of International Trade held that the Commission's determination of no material injury was unsupported by substantial evidence and not in accordance with law, requiring a remand to the Commission for further development. *Id.* at 487.

We note that the language of section 1677(4)(D) permitting resort to alternative product line data is far stronger than that present in the analogous provision of section 1677e(a), allowing Commerce and the Commission to "use the facts otherwise available" if "necessary information is not available on the record," for the purpose of making antidumping duty determinations. 19 U.S.C. § 1677e(a) (2000). Indeed, the actual language of section 1677(4)(D) more closely resembles the language of former section 19 U.S.C. § 1677e(c), stating that Commerce and the Commission "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form requested, or otherwise significantly impedes an investigation, use the best information otherwise available." 19 U.S.C. § 1677e(c) (1988). This language has been consistently interpreted to require active efforts on the part of the Commission and Commerce to obtain relevant data, prior to invoking the best information rule. Examining a dumping determination by Commerce, the Court of International Trade characterized this duty as one "to reasonably avail itself of its own powers to obtain relevant information in the absence of cooperation by a respondent." *Rhone-Poulenc, Inc. v. United States*, 927 F. Supp. 451, 457 (Ct. Int'l Trade 1996). In *Budd Co. Railway Division v. United States* 507 F. Supp. 997, 1001 (Ct. Int'l Trade 1980), the Court of International Trade expressly noted that this information is not limited to "that furnished by the petitioner or by any party-in-interest to the proceedings." Further, as the Commission possesses the authority to issue subpoenas in pursuing its investigations, unlike Commerce, there is an even stronger rationale to believe that the Commission's resort to the product line provision must be accompanied by active efforts on the part of the Commission to acquire relevant data. *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990).

The Commission's efforts do not meet this standard. To the extent the Commission determined that the domestic industry was incapable of supplying such information, it is incorrect. As the Final Determination expressly states in footnote 155, the domestic producers "did provide segregated production and shipment quantity and value data for cold-rolled plate." Indeed, the Final Determination even contains tables referring to domestic cold-rolled plate volume and the market share of cumulated subject imports, attributing this limited data to information supplied by importers. To say that the domestic industry was "unable" to supply relevant cold-rolled plate data can mean only that it was unable to do so because the Commission did not expressly ask for such information. Indeed, noting that the Commission "did not collect price comparison data on any cold-rolled plate products," the Final Determination explains this fact as resulting from the failure of any party to request that the Commission do so. The record does not afford substantial evidence to support the Commission's rationale for resorting to section 1677(4)(D). To the contrary, the record supplies ample evidence to reject the Commission's decision to do so.

We also cannot overlook the sequence of the Commission's actions. The domestic industry argued that there should be one, not two, segments of the domestic industry under consideration. The Commission agreed with the domestic industry in its initial determination, stating only that it would reconsider its decision in its Final Determination. The domestic industry did not bear the burden to prove that there are two segments to assess; its litigation strategy was to convince the Commission that only a single segment should be considered. Testimony by domestic industry representatives about the lack of domestic interest in cold-rolled plate, as a result of its small overall volume in the domestic market, was given at the time domestic industry was seeking to convince the Commission to treat cold-rolled plate as part of the overall single domestic market.

In the end, the Commission—never having independently collected any pertinent data about a separate domestic cold-rolled plate industry—decided that the domestic industry was divided into two segments. The practical problem it faced was how to justify its ultimate conclusion of no material injury to the cold-rolled plate segment, absent the necessary data. To address this problem, the Commission decided to rely upon a direct comparison of the data for cold-rolled imports with that for the overall domestic market for stainless steel plate.

Indeed, the Commission's impact analysis hinges upon this, stating that "we find that subject cold-rolled imports are too small in magnitude to have contributed to the observed declines in the profitability, employment or capacity of the domestic industry producing certain stainless steel plate in coils." The Commission's analysis of volume is inspired by a similar view, noting that "domestic industry's production of cold-rolled plate is very limited and that the industry itself has characterized cold-rolled plate as a tiny and unimportant part of its business."

As the Court of International Trade has stated, "[i]t is incumbent on the [Commission] to acquire all obtainable or accessible information from the affected industries on the economic factors necessary for its analysis." *Roquette Freres v. United States*, 583 F. Supp. 599, 604 (Ct. Int'l Trade 1984). "In so doing, it is clear that all information that is 'accessible or may be obtained,' from whatever its source may be, must be reasonably sought by the Commission." *Budd Co. Ry. Div.*, 507 F. Supp. at 1003–04. The Commission may not shirk this duty by asserting a failure of the parties to request that the Commission gather specific information. Indeed, this position has been explicitly rejected. *Rhone-Poulenc*, 927 F. Supp. at 456–57. We thus conclude that the Commission erred in resorting to the product line provision in assessing the volume and impact of the subject imports.

Our decision is not inconsistent with the determination of the Court of International Trade that there was no legal error *per se* in the failure of the Commission to collect specific data. *Allegheny,* 116 F. Supp. 2d at 1295. The Commission does indeed enjoy discretion to conduct its investigation and gather data it deems relevant. *Czestochowa v. United*

States, 890 F. Supp. 1053, 1075 (Ct. Int'l Trade 1995). However, the Commission is obligated to make active, reasonable efforts to obtain relevant data. This is particularly true when the Commission seeks to invoke its inability to obtain information on a specific domestic like product in order to rely on the product line provision.

The Commission's failure to attempt to get relevant data prior to resorting to the product line provision renders the Commission's analysis of the volume and impact factors under section 1677(7)(B) legally unsound.

IV

With regard to the Commission's price analysis, the Court of International Trade found error in the Commission's use of the average unit values ("AUVs") of the subject imports as indicators of specific price trends. The Court of International Trade noted that our decision in *United States Steel Group v. United States*, 96 F.3d 1352 (Fed. Cir. 1996), expressly declined to "hold, as a general rule, that the Commission may not rely on AUV trends as indicative of corresponding changes in price." *Id.* at 1364. However, the Court of International Trade found that here, as the product mixes of the domestic and foreign merchandise differed, "the fact that for much of the period reviewed the AUVs for subject imports were higher than those for domestic cold-rolled plate, without more, says little about whether there was significant price competition between similarly situated cold-rolled products." *Allegheny*, 116 F. Supp. 2d at 1298.

The Commission did indeed rely on AUVs as indicators of specific price trends in determining that there was no material injury, stating that:

> The average unit value of cumulated subject imports declined steadily over the period of investigation, beginning at a higher level than that for the domestic like product and falling below in 1997 and interim 1998. There is no clear connection between the subject imports and the domestic price declines, since, during much of the period, the domestic price decreased even though subject imports were priced substantially higher.

Certain Stainless Steel Plate from Belgium, Canada, Italy, Korea, South Africa, and Taiwan, Inv. Nos. 701–TA–376, 377, and 379 (Final) and Inv. Nos. 731–TA–788–793 (Final), USITC Pub. 3188 at 23–4 (May 1999).

This is inaccurate for two reasons, as the Court of International Trade correctly noted. First, the conclusion is logically unsound. Even assuming the Commission's use of AUVs to be proper, the falling prices of the imported merchandise would seem to *support* a finding of material injury to domestic producers, despite the fact that the subject imports were priced higher than corresponding domestic like products. Second, as the Court of International Trade noted, the AUV data at question here is strongly influenced by a few orders of particular grade or size. *Allegheny*, 116 F. Supp. 2d at 1298. The government does not dispute this, and indeed concedes that "significant product differences [exist] between the domestic and imported merchandise." This seriously undermines the utility of such data.

Accordingly, the Commission's price determination is not supported by substantial evidence.

V

In spite of the errors in the Final Determination, the Court of International Trade affirmed the decision of no material injury, finding that "the Commission identified significant evidence showing that the domestic cold-rolled plate industry was not interested in producing and selling cold-rolled plate." *Allegheny*, 116 F. Supp. 2d at 1308.

Considerable evidence does exist to this effect. Before the Commission, representative after representative of the domestic manufacturers stated that although they had the capability to produce cold-rolled plate, they did not. In the words of the steel executives themselves, "there just isn't [a] market for it, as we see it," "[o]ccasionally somebody will need cold-rolled product, but it's so infrequent that we just don't see a market for it," "the market for this product is almost insignificant," and "our customer needs are generally met with a hot-rolled product." At least one of the industry representatives was unfamiliar with whether his company actually produced cold-rolled plate, while an industry consultant described any production of cold-rolled plate as "accidental." *Id.* at 1304. In response to questioning as to whether Allegheny would ever conceivably produce cold-rolled plate, the Allegheny representative flatly stated "no." The no material injury determination of the Final Determination is grounded at least in part on this evidence. In its analysis of volume, the Commission stated, "the industry itself has characterized cold-rolled plate as a tiny and unimportant part of its business." The utility of this evidence, however, is limited by the fact that testimony from the domestic industry sources, frankly admitting little interest in cold-rolled plate due to its small volume in the domestic market, entered the record at a time when the domestic industry was pleading for a single domestic rolled plate industry.

Key to the Commission's initial determination to treat hot and cold-rolled plate as a single domestic like product, from the perspective of domestic industry, was the lack of enthusiasm of domestic industry in the market for cold-rolled plate, as aptly demonstrated by the testimony. In the Final Determination, however, the Commission relied on this lack of interest on the part of domestic industry to buttress its ultimate conclusion regarding the impact and volume assessments, these assessments being based upon flawed reliance on the entire domestic market for steel plate as a surrogate for that of cold-rolled steel plate.

Initially, Allegheny argues that we must reject any reliance on the evidence showing lack of domestic interest in cold-rolled plate. Allegheny asserts that the Supreme Court's decision in *Securities and Exchange Commission v. Chenery*, 332 U.S. 194 (1947), and its progeny compel reversal of the decision of the Court of International Trade, arguing that the Court of International Trade has effectively substituted its judgment for that of the Commission, in affirming the Final Determination on the basis of the lack of interest of domestic industry in the cold-rolled steel plate industry, rather than upon the volume-price-impact analysis. Admittedly, this is a close question. However, we believe that the Court did not substitute its own judgment for that of the Commission. As noted above, the Commission's evaluation of both volume and impact was informed by the underlying perception of a lack of interest on the part of domestic industry. Allegheny's *Chenery* argument must therefore fail.

Allegheny additionally contends that the reliance of the Court of International Trade on such evidence to affirm the Commission's decision is incorrect. Citing our decisions in *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978 (Fed. Cir. 1994) and *Oregon Steel Mills Inc. v. United States*, 862 F.2d 1541 (Fed. Cir. 1988), Allegheny attempts to portray such reliance as inconsistent with prior caselaw finding a lack of interest on the part of domestic industry. This is misplaced. Section 1677(7)(B)(ii) clearly authorizes broad evaluation of any relevant factors, stating that the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." Statements by industry representatives in a formal hearing before the Commission regarding their own motives behind their production, or lack thereof, of domestic like products certainly qualify as relevant. Indeed, as we noted in *Suramerica*, "[t]he industry best knows its own economic interests and, therefore, its views can be considered an economic factor." *Suramerica*, 44 F.3d at 984. The Commission is surely entitled to rely on "other economic factors," but such factors cannot replace the mandatory elements of the analysis, absent a showing that those elements, in a given case, simply cannot be assessed.

Allegheny's strongest contention is thus that the statutory language directing the Commission's work cannot be satisfied by a decision that is flawed as to all three factors in the circumstances of this case. This carries weight. Section 1677(7)(B) sets forth three factors that the Commission is directed to consider in conducting its evaluation of "material injury," using the mandatory "shall" language—price, volume, and impact. Consideration of other factors is permissive.

Our caselaw has clearly interpreted section 1677(7)(B) as requiring the Commission to evaluate each of the mandatory factors in reaching a decision. In *Angus Chemical Co. v. United States*, 140 F.3d 1478 (Fed. Cir. 1998), we sustained a challenge to the Commission's practice of using a "two-step" analysis for material injury, first assessing whether domestic industry had indeed suffered injury, then evaluating to what extent the imported merchandise contributed to the injury. *Id.* at 1483. Although sustaining the Commission's "two-step" practice, the *Angus* court found that the statutory language of section 1677(7)(B) "unmistakably requires the Commission to consider the three listed factors in making its material injury determination." *Id.* at 1484. "[S]ide-stepping the statutory mandate" in considering less than all of the factors was not justified in order to reach a negative determination. *Id.* at 1485. As a result, the *Angus* court conducted a searching review of the opinions of the concurring commissioners to determine whether sufficient findings had indeed been made as to each of the price, volume, and impact factors. *Id.* at 1486. Under *Angus*, the Commission is thus obliged to conduct a good faith effort to fulfill its statutory mandate.

It is true that our caselaw does not require each of the factors set forth in section 1677(7)(B) to be correctly analyzed by the Commission in order to affirm its decision. Review of this aspect of Commission determinations takes place under the substantial evidence standard. *Taiwan Semiconductor*, 266 F.3d at 1344–45. Under this deferential standard, we have affirmed Commission determinations where the analysis of one of the three mandatory factors is unsupported by substantial evidence. *United States Steel Group*, 96 F.3d at 1364–65 (finding that even were the price-suppression determination not supported by substantial evidence, the decision could be affirmed nonetheless).

Notwithstanding the tolerance of the substantial evidence requirement for Commission determinations which contain some errors, neither the statutory language nor *Angus* permits a court to affirm a Final Determination which is legally flawed as to *each* of the three factors the Commission is obliged to consider, in circumstances showing a failure on the part of the Commission to seek the necessary information to carry out its statutory duties. The Commission is obligated by law to consider volume, price and impact in reaching its determination on the subject of material injury. It is also permitted, under 19 U.S.C. § 1677(7)(B)(ii), to "consider such other economic factors as are relevant to the determination [of material injury]." Permissive authority to consider economic factors in addition to the specific factors that must be considered does not excuse the obligation first to evaluate the mandatory volume, price and impact factors. A contrary holding would eviscerate the requirement that the Commission "consider" each of the mandatory factors. *Angus* stands for the proposition that the Commission must make a good faith effort to carry out its statutory mandate in conducting its review.

For the foregoing reasons, the decision of the Court of International Trade to affirm the Commission's Final Determination is incorrect.

CONCLUSION

As each of the statutory factors which the Commission is obligated to consider under section 1677(7)(B) is legally flawed or unsupported by substantial evidence, the decision of the Court of International Trade is vacated and the case is remanded for proceedings not inconsistent with this decision.

COSTS

No costs.

VACATED AND REMANDED

ARTHUR L. FRANKLIN (DOING BUSINESS AS HEALTH TECHNOLOGIES NETWORK), PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01–1340

(Decided April 26, 2002)

Mark T. Coberly, Vanderventer Black LLP, of Norfolk, Virginia, argued for plaintiff-appellant.

Arthur J. Gribbin, Attorney, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Robert D. McCallum, Jr.*, Assistant Attorney General; *David M. Cohen*, Commercial Litigation Branch, Department of Justice, of Washington, DC; and *Joseph I. Liebman*, former Attorney in Charge, International Trade Field Office; and *Aimee Lee*, Attorney, Civil Division, Commercial Litigation Branch, Department of Justice, of New York, New York. Of counsel on the brief was *Beth C. Brotman*, Attorney, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of New York, New York. Of counsel was *John J. Mahon*, International Trade Field Office.

Appealed from: United States Court of International Trade
Judge DONALD C. POGUE

Before LOURIE, GAJARSA, and PROST, *Circuit Judges*.

PROST, *Circuit Judge*.

Arthur L. Franklin d/b/a Health Technologies Network ("Franklin") appeals from the decision of the United States Court of International Trade denying Franklin's motion for summary judgment and granting the government's cross-motion for summary judgment that the United States Customs Service ("Customs") properly classified Franklin's imported coral sand packets under subheading 2106.90.99 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202 ("HTSUS"). *Franklin v. United States*, 135 F. Supp. 2d 1336 (Ct. Int'l Trade 2001). We conclude that the imported goods are properly classified under subheading 8421.21.00 of the HTSUS and therefore reverse.

BACKGROUND

The imported goods at issue in this case are coral sand packets that were imported by Franklin in 1995, 1996, and 1997. *Franklin*, 135 F. Supp. 2d at 1337. This coral sand, otherwise known as coral calcium, is mined from fossilized coral reefs in Okinawa, Japan. After harvesting, the coral is washed, dried, treated with L-ascorbic acid, and packaged in one-gram fiber bags. *Id.* at 1344. When the consumer places one of these fiber bags in a specified amount of water, the coral adds calcium and magnesium ions to the water. This increases the water's pH, rendering it more alkaline or "hardening" it. *Id.* at 1339. The alkaline environment produced by this process kills bacteria in the water. *Id.* Additionally, the L-ascorbic acid reacts with and neutralizes chlorine in the water. *Id.* Less than 5% of the product goes into solution, and the majority of the coral sand is not ingested with the water but instead remains in the fiber bag at the bottom of the glass.

Customs classified the coral sand under subheading 2106.90.99 of the HTSUS, *id.* at 1338, which is a residual, or "basket," provision of heading 2106 that covers "[f]ood preparations not elsewhere specified or included * * * [o]ther," HTSUS, subheading 2106.90.99.[1] Imports classifiable under this subheading were dutiable at a rate of 9.4% (1995), 8.8% (1996), and 8.2% (1997) *ad valorem*. *Franklin*, 135 F. Supp. 2d at 1338. Franklin protested this classification and subsequently challenged it in the Court of International Trade. *Id.* According to Appellant, its coral packets were properly classifiable under subheading 8421.21.00 of the HTSUS, *id.* at 1337, which covers:

8421	Centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gasses; parts thereof:
8421.21	Filtering or purifying machinery and apparatus for liquids:
8421.21.00	For filtering or purifying water

HTSUS, heading 8421. Goods classified under subheading 8421.21.00 were subject to duty rates of 3.1% (1995), 2.3% (1996), and 1.6% (1997) *ad valorem*. *Franklin*, 135 F. Supp. 2d at 1337.[2]

Both parties moved for summary judgment. *Id.* at 1338. The Court of International Trade denied Franklin's motion and granted the government's corresponding cross-motion, holding that Customs had correctly classified Appellant's imported goods as a "[f]ood preparatio[n] * * * [o]ther" under subheading 2106.90.99. *Id.* at 1345.

As a preliminary matter, the court concluded that Franklin's coral sand was not a filtering or purifying device within the meaning of heading 8421. *Id.* at 1341. The court based this conclusion upon its finding that the coral sand had two distinct uses: (1) reduction of bacteria and neutralization of chlorine in the water, *id.* at 1340–41; and (2) addition of "hardness," or water alkalinity, which, according to Franklin's mar-

[1] Specifically, subheading 2106.90.99 covers "[p]reparations for the manufacture of beverages: (71) Containing high-intensity sweeteners (e.g., aspartame and/or saccharin); (72) Containing sugar derived from sugar cane and/or sugar beets; (73) Other; (75) Non-dairy coffee whiteners; (80) Other cream or milk substitutes; (85) Confectionary (including gum) containing synthetic sweetening agents (e.g., saccharin instead of sugar); (87) Herbal teas and herbal infusions comprising mixed herbs; (88) Flavored honey; (90) Other: Canned; (95) Other: Frozen; (97) Other: Containing sugar derived from sugar cane and/or sugar beets; (98) Other * * *." HTSUS, subheading 2106.90.99.

[2] On appeal, Franklin abandons its alternative claim for classification as "[c]oral and similar materials, unworked or simply prepared but not otherwise worked" under heading 0508, HTSUS.

keting materials, made the water healthier, *id.* at 1341.[3] According to the court, the first use qualified as purification or filtration under 8421, but the second did not. As the court stated, "[i]nsofar as the addition of hardness raises the alkalinity level of water, and thereby benefits the health of the consumers in ways other than those associated with the reduction of bacteria, * * * the merchandise does not purify or filter in the sense required under heading 8421." *Id.* The court noted that because 8421 is a "use" provision, Franklin's coral sand must have been "chiefly used" to filter or purify in order to fall under the heading. *Id.* After examining Appellant's marketing materials, the court determined that Franklin had failed to provide any evidence from which one could infer that the coral sand's chief use was to purify. *Id.* As such, the court concluded that the coral sand was not properly classifiable under subheading 8421.21.00.

The court further analyzed the coral sand under heading 2106. It concluded that because the sand was added to and affected the properties of water that was ultimately ingested, it qualified as a food preparation. *Id.* at 1344. The court found that the coral sand steeped in the water in a manner similar to the dissolving process described in Explanatory Note 21.06(A) and therefore fell within the heading. *Id.* The court also based its holding upon its finding that Franklin's coral qualified as an "infusion" within the meaning of Explanatory Note 21.06(14). *Id.* at 1344 n.13. Within heading 2106, the court found that the coral sand was properly classified under subheading 2106.90.99 because no other subheading covered Appellant's goods more specifically. *Id.* at 1345. Because the court found that the subject merchandise was classifiable under only one of the suggested headings, it concluded that the case presented no relative specificity issue under General Rule of Interpretation ("GRI") 3. *Id.* at 1340.

Franklin timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the Court of International Trade's grant of summary judgment without deference. *Mead Corp. v. United States*, 238 F.3d 1342, 1345 (Fed. Cir. Mar. 8, 2002). The proper scope and meaning of a tariff classification term is a question of law to be reviewed *de novo*, *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997), while determining whether the goods at issue fall within a particular tariff term as properly construed is a question of fact, *N. Am. Processing Co. v. United States*, 236 F.3d 695, 697 (Fed. Cir. 2001). We afford Customs' classification rulings deference in accordance with the principles set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Mead*, 238 F.3d at 1346. Under *Skidmore*, a classification decision receives a measure of deference propor-

[3] As the court noted, "Arthur Franklin's marketing materials emphasize that water of a higher alkalinity may bring health benefits to the user, because the human diet generally tends to produce a sub-optimal acidity level in the body." *Id.* at 1341.

tional to its power to persuade. *Skidmore*, 323 U.S. at 140. Despite this deference, however, the court continues to "recogniz[e] its independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms." *Mead*, 238 F.3d at 1346 (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

The GRIs of the HTSUS and the Additional United States Rules of Interpretation guide the court's classification of goods imported into the United States. *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000). According to GRI 1, "classification shall be determined according to the terms of the headings and any relevant section or chapter notes * * *." *Franklin*, 135 F. Supp. 2d at 1340 n.3. "Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). Under GRI 3(a), when goods are *prima facie* classifiable under two or more headings, the merchandise should be classified under the heading that provides the most specific description.

Absent legislative intent to the contrary, we construe HTSUS terms according to their common and commercial meanings, which are presumed to be the same. *N. Am. Processing*, 236 F.3d at 698. In construing a tariff term's common meaning, the court may rely on its own understanding of the term as well as upon lexicographic and scientific authorities. *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). The court may also refer to the Explanatory Notes accompanying a tariff subheading. *Id.* Although these notes do not constitute controlling legislative history, they are nonetheless intended to clarify the scope of the HTSUS subheadings and to offer guidance in their interpretation. *Id.*

A

SUBHEADING 8421.21.00

Franklin argues that the Court of International Trade erred when it concluded that Customs properly classified its coral sand under subheading 2106.90.99. Appellant asserts that its coral sand purifies within the meaning of heading 8421 because it removes unwanted constituents from water and therefore falls under the definition of "purify" set forth in *Noss Co. v. United States*, 588 F. Supp. 1408 (Ct. Int'l Trade 1984), *aff'd*, 753 F.2d 1052 (Fed. Cir. 1985), and *Deringer v. United States*, 656 F. Supp. 670 (Ct. Int'l Trade 1986), *aff'd*, 832 F.2d 592 (Fed. Cir. 1987). According to Franklin, these unwanted constituents are chlorine, bacteria, and softness. Finally, Franklin asserts that its coral sand works in precisely the same manner as a zeolite water softener, which is specifically covered by the Explanatory Notes accompanying subheading 8421.21. Franklin asserts that because its coral functions according to the same chemical principals as zeolite softeners, the sand should fall within the same tariff subheading.

The government responds that the Court of International Trade correctly affirmed Customs' classification of Franklin's coral under

2106.90.99. The government argues that Appellant's goods do not purify or filter within the meaning of heading 8421 because the coral sand's principal use is to raise the alkalinity of water, thereby making it harder and allegedly healthier for consumers. According to the government, the coral sand's antibacterial and chlorine-neutralizing effects are incidental to this principal use. The government distinguishes Franklin's merchandise from a zeolite water softener on the ground that while the specific purpose of a water softener is to remove hardness from water, the intended effect of Appellant's coral sand is to add hardness and alkalinity.

We agree with Franklin that its goods are properly classified under subheading 8421.21.00. In *Noss*, the Court of International Trade relied on several lexicographic sources to construe the tariff term "purify"[4] to mean "to make pure: as to clear from material defilement or imperfection; free from impurities or noxious matter. * * * To free from admixture with foreign or vitiating elements; make clear or pure. * * * *[T]o remove unwanted constituents from a substance*." 588 F. Supp. at 1412 (emphasis added) (internal citations omitted).

Under *Noss*, an imported good purifies if it removes *unwanted constituents* from a substance, regardless of what those unwanted constituents may be. The relative "purity" of the constituents themselves is immaterial. In *Deringer*, 656 F. Supp. at 671, for example, the Court of International Trade addressed the question of whether reverse osmosis maple sap concentrators qualified as filtering and purifying machinery under heading 661, TSUS.[5] Appellant Deringer argued that they did not because, rather than removing an impurity in "the classical sense," the machines removed water, thereby concentrating the remaining sugar, minerals, and bacteria and resulting in an increasingly "impure" product. *Id.* Relying on *Noss*, the court rejected this argument, concluding that Deringer's goods purified within the meaning of the tariff term because they freed the sap from "extraneous matter," namely excess water. *Id.* at 672. As the court observed, "[w]hile excess water may not be an impurity in 'the classical sense,' it is clear from testimony that it is an 'unwanted constituent' in the raw maple sap used in making maple syrup." *Id.* As such, the court held that the concentrators purified within the meaning of the tariff classification. *Id.*

Franklin's coral sand functions exclusively to remove unwanted chlorine, bacteria, and acidity from water. Its principal use is therefore to purify within the meaning of subheading 8421.21.00. In holding otherwise, the Court of International Trade relied on a false distinction between the sand's use in eliminating chlorine and bacteria and in altering the water's pH. The court rejected Franklin's filtration/purification argument on the ground that "there is no evidence to indicate that the pH level of 'good' water is an 'imperfection,' or in any other way an 'un-

[4] The court noted that "filter" and "purify" could be used synonymously, 588 F. Supp. at 1413 n.4, but held that a device need not both purify and filter in order to fall within the tariff classification, *id.* at 1412.

[5] Heading 661, TSUS was replaced without relevant change by heading 8421, HTSUS.

wanted constituent' of the water itself, *in the same way that bacteria or chlorine is*." *Franklin v. United States*, 135 F. Supp. 2d 1336, 1341 (Ct. Int'l Trade 2001) (emphasis added). For purposes of heading 8421, however, the relevant inquiry is not whether the subject merchandise removes inherently unsalutary "imperfections" such as bacteria or chlorine. Instead, as in *Noss* and *Deringer*, the question is whether the goods at issue remove unwanted extraneous matter. *Noss*, 588 F. Supp. at 1412; *Deringer*, 656 F. Supp. at 672. While decisions of the Court of International Trade are not binding precedent on this court, *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1556 (Fed. Cir. 1988), we find the rationale set forth in these two cases persuasive. Because the principal use of Franklin's coral sand is to eliminate unwanted properties from water, it is properly classified under subheading 8421.21.00. Additionally, we note that the Court of International Trade relied in part on the marketing material's lack of emphasis on purifying and its reference to the healthful benefits of an increase in the body's pH level. We consider that these materials are not decisive either way, as they refer both to health and purification.

We further note that the coral sand uses a similar exchange of ions as that employed by a zeolite water softener, only in reverse. Zeolites act chemically to remove calcium and magnesium ions from hard water by adding sodium ions; Appellant's coral replaces hydrogen ions with calcium and magnesium ions, thereby rendering softer water "harder" or less acidic. In other words, both zeolites and Franklin's coral adjust the pH of water by a process of ionic exchange. As discussed above, zeolite water softeners are specifically covered by the Explanatory Notes accompanying subheading 8421.21. "While Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTS[US] subheadings." *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995). Here, we find that the coral sand's similarity to a zeolite water softener further supports our finding that the sand is properly classified under subheading 8421.21.00.

B

SUBHEADING 2106.90.99

Franklin argues that its coral sand was not properly classifiable as a food preparation under heading 2106 and that the Court of International Trade therefore erred in affirming Customs' classification. Appellant asserts that its product is not food because it is not taken into the system and does not supply nutrients to support life and growth. Instead, Appellant argues, the majority of the coral remains at the bottom of the glass while a small percentage goes into solution in order to change the chemical content of the water. Franklin relies heavily upon *Strauss v. United States*, 43 Cust. Ct. 136 (1959). According to Appellant, *Strauss* stands for the proposition that imported merchandise is not a food preparation if the consumer does not eat the entire product; ingesting a few of the goods' constituent elements is not enough.

The government responds that Appellant's merchandise is edible because it is specifically used to treat drinking water and because the elements imparted by the product are ultimately ingested by the consumer. According to the government, the Court of International Trade correctly found that the coral sand imparts hardness and alkalinity to the water in a manner similar to the dissolving process specified in the Explanatory Notes at 21.06(A). Therefore, the government argues, the court correctly affirmed the sand's classification under subheading 2106.90.99. Finally, the government distinguishes *Strauss* on the ground that unlike the bubble gum at issue in that case, the consumer is intended to ingest the hardness and alkalinity added to water treated with Appellant's coral sand.

As a preliminary matter, we note that GRI 3(a) is instructive. Even assuming *arguendo* that Customs was correct when it found that Franklin's coral sand was *prima facie* classifiable as a "[f]ood preparatio[n] not elsewhere specified or included" under heading 2106, heading 8421 provides a more specific description of the subject merchandise. Consequently, Appellant's coral is properly classified under that heading in general and under subheading 8421.21.00 in particular. GRI 3(a); *Orlando Foods Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998) ("[W]hen a product is prima facie classifiable under two or more headings, '[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.'") (quoting GRI 3(a)).

We further agree with Franklin, however, that the coral sand is not a food preparation at all within the meaning of heading 2106. In *Strauss*, 43 Cust. Ct. at 141, the United States Customs Court held that bubble gum was not "an edible preparation" under the Tariff Act. Before the court, the government argued that the tariff classification should be construed to cover gum because the product contained sugar and dextrose syrup which were swallowed as the gum was chewed. *Id.* at 140. According to the government, bubble gum's status as food depended upon whether its component parts were edible. The court rejected this argument. As the court stated:

> The common meaning to be applied is that of the imported preparation, not of its several components. While the sugars and syrup in the preparation "bubble gum" are nutritious when swallowed, and in that sense they (the sugars and syrup) are edible, there is not such evidence as to the preparation "bubble gum." To the contrary, it appears that bubble gum is not customarily eaten and swallowed.

Id. at 140. Similarly, nothing in the instant record indicates that one would eat one of Franklin's one-gram bags of coral sand. Even if the goods' component parts, namely calcium carbonate or, as the government argues, alkalinity, are ingested, this is not enough to bring Franklin's product within heading 2106. Although *Strauss* is not binding precedent on this court, we find its rationale persuasive.

Of course, the analysis cannot end here, because one typically would not eat a bag of tea, either. As discussed above, the Court of International Trade relied heavily upon Explanatory Note 21.06(14), which provides for the inclusion within heading 2106 of "[p]roducts consisting of a mixture of plants or parts of plants * * * which are not consumed as such, but which are of a kind used for making herbal infusions or herbals 'teas'. * * *" *Franklin v. United States*, 135 F. Supp. 2d 1336, 1344 n.13 (Ct. Int'l Trade 2001). The court found that although Appellant's coral is not a plant but an animal, it was accurately described as an "infusion." *Id.* It based this conclusion on its finding that like tea, one "steep[ed]" the coral sand in water, *id.* at 1344, and thereby "impregnat[ed] the liquid with its properties," specifically hardness, alkalinity, and the chlorine-neutralizing effects of the L-ascorbic acid, *id.* at 1344 n.13 (quoting 7 Oxford English Dictionary 953).

This finding misconstrues the processes that occur when Franklin's coral sand is placed in water. Unlike tea, the subject merchandise is not consumed as a food. It purifies the water. Moreover, the purification heading 8421.21.00 is more specific than the food preparation heading 2106.90.99. Accordingly, we find that the subject merchandise is not correctly classified as a "[f]ood preparatio[n] * * * other" within the meaning of subheading 2106.90.99.

CONCLUSION

Although we are mindful of Customs' expertise and that of the Court of International Trade in classifying imported articles, for the reasons stated above, we conclude that Franklin's coral sand is not a food preparation. The classification ruling at issue here lacks the power to persuade under the principles set forth in *Skidmore*. Because the imported articles are correctly classified under subheading 8421.21.00, the decision of the Court of International Trade is reversed.

REVERSED

RHP BEARINGS LTD., NSK BEARINGS EUROPE LTD., AND NSK CORP., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE, AND THE TORRINGTON CO., DEFENDANT-APPELLEE

Appeal No. 01–1160

(Decided April 30, 2002)

Matthew P. Jaffe, Lipstein, Jaffe & Lawson, LLP, of Washington, DC argued for plaintiffs-appellants. With him on the brief were *Robert A. Lipstein* and *Grace W. Lawson*.

Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant United States. With her on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; and *David M. Cohen*, Director. Of counsel on the brief were *John D. McInerney, Acting Chief Counsel*; *Berniece A. Browne*, Senior Counsel; and *David R. Mason*, Attorney, Office of Chief Counsel for Import Administration, Department of Commerce, Washington, DC.

Geert De Prest, Stewart and Stewart, of Washington, DC, argued for defendant-appellee The Torrington Company. With him on the brief were *Terence P. Stewart* and *Lane S. Hurewitz*. Of counsel was *Wesley K. Caine*.

Appealed from: United States Court of International Trade
Senior Judge NICHOLAS TSOUCALAS

Before NEWMAN, SCHALL, and BRYSON, *Circuit Judges*.

SCHALL, *Circuit Judge*.

RHP Bearings Ltd. ("RHP Bearings"), NSK Bearings Europe Ltd. ("NSK Bearings"), and NSK Corporation (collectively, "RHP-NSK") appeal the final decision of the United States Court of International Trade that affirmed the final antidumping duty determination of the United States Department of Commerce, International Trade Administration ("Commerce"), in *Antifriction Bearings (Other Than Tapered Rolling Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 63 Fed. Reg. 33,320 (Dep't Commerce June 18, 1998). *RHP Bearings Ltd. v. United States*, 120 F. Supp. 2d 1116 (Ct. Int'l Trade 2000). The Court of International Trade held that, in its determination of the antidumping duty to be applied to antifriction bearings imported into the United States by RHP-NSK during the period covered by the *Final Results*, Commerce had not erred in computing (i) the constructed export price of the imported bearings, pursuant to 19 U.S.C. § 1677a (1999)[1], or (ii) the normal value of the bearings, pursuant to 19 U.S.C. § 1677b. *RHP Bearings*, 120 F. Supp. 2d at 1131. Specifically, the court determined that Commerce did not err when, in computing the constructed export price of the subject bearings, it declined to apply the special rule of 19 U.S.C. § 1677a(e), that comes into play in the circumstances where value is added to merchandise after importation. *RHP Bearings*, 120 F. Supp. 2d

[1] Because the administrative review at issue was initiated after January 1, 1995, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub.L. No. 103–465, 108 Stat. 4809 (1994) (effective January 1, 1995). Therefore, unless otherwise indicated, statutory citations are to the 2000 version of the United States Code. No relevant amendments have been made to the pertinent statutory provisions since the URAA amendments.

at 1126. The court also held that, when using constructed value to determine the normal value of the subject bearings, *see* 19 U.S.C. § 1677b(e), Commerce did not err in computing the profit component of constructed value.[2] *RHP Bearings*, 120 F. Supp. 2d at 1126–27.

We affirm the decision of the Court of International Trade sustaining Commerce's determination of constructed export price. We do so because we conclude that, under 19 U.S.C. § 1677a(e), Commerce had discretion as to whether to apply the special rule, and RHP does not, in the alternative, challenge Commerce's calculation as otherwise unreasonable or unsupported by substantial evidence. However, we vacate the court's decision sustaining Commerce's calculation of the profit component of constructed value and remand the case for further proceedings. That result is mandated by our recent decision in *SKF USA Inc. v. United States*, 263 F.3d 1369 (Fed. Cir. 2001). There, we vacated the decision of the Court of International Trade and remanded the case with the instruction that Commerce (i) explain its methodology for calculation of constructed value profit (identical to Commerce's constructed value profit calculation challenged in this appeal), and (ii) explain why that methodology comported with statutory requirements. We thus affirm-in-part, vacate-in-part, and remand.

BACKGROUND

I.

The antidumping law provides that if Commerce determines that imported merchandise is being sold in the United States "at less than its fair value" and the practice is causing material injury to a domestic industry, "there shall be imposed upon such merchandise an antidumping duty." 19 U.S.C. § 1673. The antidumping duty is "in an amount equal to the amount by which the normal value exceeds the export price * * * for the merchandise." 19 U.S.C. § 1673. "Normal value" generally is the price at which the "subject merchandise"[3] is sold in the exporting country. *See* 19 U.S.C. § 1677b. "Export price" generally is the price at which the subject merchandise is first sold in the United States. *See* 19 U.S.C. § 1677a.

A. Determining Constructed Export Price.

When a foreign producer or exporter sells a product to an affiliated purchaser in the United States, the antidumping law provides for the use of a "constructed export price" as the "export price" for purposes of computing the dumping margin (the difference between normal value and export price). *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1303 (Fed. Cir. 2001). Constructed export price is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States * * * to a purchaser not affiliated with the producer or exporter,

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[2] The Court of International Trade resolved several other issues regarding adjustments to constructed export price and normal value; they are not before us on appeal.

[3] "Subject merchandise" is defined as "the class or kind of merchandise that is within the scope of an investigation." 19 U.S.C. § 1677(25).

as adjusted under subsections (c) and (d) of [19 U.S.C. § 1677a].” 19 U.S.C. § 1677a(b).

Under section 1677a(c), the price used to establish constructed export price is subject to specified increases and reductions. Further adjustments to constructed export price are set forth in section 1677a(d). Pursuant to 19 U.S.C. § 1677a(d)(2), “the price used to establish constructed export price shall also be reduced by * * * the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e) of this section.”

Subsection (e) of section 1677a sets forth a further method of calculating constructed export price when value is added to merchandise after importation:

> **(e) Special rule for merchandise with value added after importation.**
>
> Where the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, the administering authority shall determine the constructed export price for such merchandise by using one of the following prices if there is a sufficient quantity of sales to provide a reasonable basis for comparison and the administering authority determines that the use of such sales is appropriate:
>
> (1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> (2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> If there is not a sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) or (2), or the administering authority determines that neither of the prices described in such paragraphs is appropriate, then the constructed export price may be determined on any other reasonable basis.

19 U.S.C. § 1677a(e). While they both address the situation in which value is added to merchandise after importation, sections 1677a(d)(2) and 1677a(e) represent quite different approaches to calculating constructed export price. Section 1677a(d)(2) provides for the price used to calculate constructed export price being reduced by the cost of further processing. Section 1677a(e), on the other hand, provides for calculating constructed export price without reference to the price at which the further manufactured goods are sold to an unaffiliated purchaser.

B. Determining Normal Value.

As noted above, the antidumping duty for particular merchandise is the amount by which the merchandise's normal value exceeds its export price or, when applicable, its constructed export price. Typically, normal value is calculated within a reasonable time of the sale providing a basis for the export price. *See* 19 U.S.C. § 1677b(a)(1)(A). Normal value is “the price at which the foreign like product is first sold * * * for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). However, in circumstances where an insufficient quantity of sales has occurred in the exporting country, or the market in the exporting country does not otherwise provide a comparable price, Commerce may look to third country sales of the subject merchandise to determine normal value. *See* 19 U.S.C. §§ 1677b(a)(1)(C) and 1677b(a)(1)(B)(ii). The antidumping law provides that, in such circumstances, Commerce may utilize "the price at which the foreign like product is so sold (or offered for sale) for consumption in a country other than the exporting country or the United States." 19 U.S.C. § 1677b(a)(1)(B)(ii).

In the alternative, section 1677b(a)(4) provides that where normal value cannot be determined under section 1677b(a)(1)(B)(i), then, notwithstanding section 1677b(a)(1)(B)(ii), "the normal value of the subject merchandise may be the constructed value of that merchandise." Constructed value is calculated according to 19 U.S.C § 1677b(e), which provides in pertinent part as follows:

> **(e) Constructed value.**
>
> For purposes of this subtitle, the constructed value of imported merchandise shall be an amount equal to the sum of—
>
> (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise * * *;
>
> (2)(A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (B) if actual data are not available with respect to the amounts described in subparagraph (A), then—
>
> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized [as described in part (i)] by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method * * *; and
>
> (3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject

> merchandise in condition packed ready for shipment to the United States. * * *

19 U.S.C. § 1677b(e).

As can be seen, constructed value is not the actual price at which subject merchandise is offered for sale in the exporting country. Rather, it is a "proxy" for a sales price, based on an amalgamation of component costs. *See SKF*, 263 F.3d at 1373. The statute provides four separate methods for calculating the general administrative costs and profit components of the constructed sum. 19 U.S.C. § 1677b(a)(e)(2). Actual data from the exporter's manufacture and sale of foreign like products in the exporting country is preferred. *See* 19 U.S.C. § 1677b(e)(2)(A) and (B). Only if such data is unavailable, as where there are no home-market sales of foreign like products, or only sales below-cost, is Commerce to utilize one of the remaining three methods, set forth in section 1677b(e)(2)(B). *SKF*, 263 F.3d at 1374 & n.4. We turn now to the facts of this case.

II.

This case concerns the eighth administrative review of the antidumping duty order on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof, covering the period May 1, 1996, through April 30, 1997. *RHP Bearings*, 120 F. Supp. 2d at 1118.

RHP Bearings and NSK Bearings manufacture and sell bearings in the United Kingdom, some of which are sold to a United States affiliate, NSK Corporation. During the period covered by the review, both made sales to their U.S. affiliate. As part of the administrative review, Commerce sent RHP-NSK a questionnaire requesting information concerning the quantity of sales of the subject bearings, the home market, any relevant third-country markets, the U.S. market, costs of production, and constructed value.[4] This information was sought so that Commerce could calculate normal value.

Included in the questionnaire was a section A.8, entitled "Further Manufacture or Assembly in the United States." The section was directed to "subject merchandise exported to the United States and changed in value or physical condition ('further manufacture') prior to delivery to the first unaffiliated customer in the United States." The section requested that, for the period of review, the respondent provide the weighted-average net price charged to the affiliated importer for each product included in the review that was further manufactured, as well as the weighted-average net price charged to unaffiliated U.S. customers for each further manufactured final product. *RHP Bearings*, 120 F. Supp. 2d at 1121. This information was sought to enable Commerce to determine whether the value added by further manufacture substantially exceeded the value of the subject merchandise that had been further processed. Commerce explained: "If you do not believe that the

[4] Throughout the review, Commerce treated the affiliated corporations as a single entity (collectively "RHP-NSK") for the purpose of determining antidumping duties.

value-added in the United States exceeds substantially the value of the subject merchandise that has been further processed, you need not provide this information." *See id.* RHP-NSK did not submit this data. *See id.*

The questionnaire also contained a Section E, entitled "Cost of Further Manufacture or Assembly Performed in the United States." This section requested information necessary for calculating constructed export price in the situation where it was not believed that the value added by further manufacture exceeded substantially the initial import value. Responding to Section E, RHP-NSK provided information relating to further manufacturing in the United States; this included information relating to raw materials, labor, electricity, and equipment. *See id.* at 1120–21. RHP-NSK furnished in addition an analysis of the costs of the above inputs, as well as a fairly thorough description of its accounting practices and financial methods. *See id.* at 1120. Commerce used the data provided by RHP-NSK in its questionnaire to calculate the constructed export price of the RHP-NSK bearings sold during the period of review. *See id.* at 1121.

Commerce published the preliminary results of the administrative review on February 9, 1998. *See* 63 Fed. Reg. 6512–03. In the preliminary results, Commerce stated that, except in the cases of RHP-NSK and one other manufacturer, it had employed the special rule for further manufactured goods in calculating constructed export price, *see* 19 U.S.C. § 1677a(e). 63 Fed. Reg. at 6,515. According to Commerce, this approach was consistent with Commerce's intention to apply the special rule in all cases where "the value added is likely to exceed substantially the value of the subject merchandise." *Id.* The information supplied by firms responding to Section A.8 of the questionnaire was used to determine whether this criterion was met. Commerce determined that the threshold for use of the special rule would be crossed when value added during further manufacturing in the United States contributed to a minimum of 65% of the price charged to the first unaffiliated customer for the manufactured product. *Id.* In the case of RHP-NSK, Commerce calculated the constructed export price pursuant to 19 U.S.C. § 1677a(d)(2) by deducting costs of further manufacturing described in RHP-NSK's response to Section E of the questionnaire. *Id.* Commerce did not calculate the relative value of RHP-NSK's further manufacturing. However, RHP-NSK argues, and Commerce does not dispute, that the value of such further manufacturing exceeded Commerce's 65% threshold.

With respect to the normal value calculation, *see* 19 U.S.C. § 1677b, Commerce determined, based upon responses to its questionnaire, that RHP-NSK and several other exporting firms could not base normal value on home market sales in the manner contemplated by 19 U.S.C. § 1677b(a)(1)(B)(i). Commerce explained that a substantial portion of home market sales for RHP-NSK and the several other manufacturers had been determined to be below the cost of production and that, therefore, pricing data from home market sales would not be used in determining normal value. *Preliminary Results*, 63 Fed. Reg. at 6516. In arriving at this determination, Commerce relied upon data for all identical bearings, and bearings within the same family.[5] *Id.* Having determined that normal value could not be calculated under section 1677b(a)(1)(B)(i), Commerce turned to the constructed value methodology of 19 U.S.C. § 1677b(e). In arriving at the profit component to be used in the constructed value calculation, Commerce utilized 19 U.S.C. § 1677b(e)(2)(A), which looks to profits in connection with the production and sale of a foreign like product. *Final Results*, 63 Fed. Reg. 33,320 at 33,333. However, in that regard, Commerce did not employ the same definition of "foreign like product" that it had used in the price-based calculations that it had initially made under § 1677b(a)(1)(B)(i) (identical bearings and bearings within the same family). Rather, it referenced "all [anti-friction bearing] models within the order-specific subject merchandise that were reported in the foreign-market sales databases as potential matches to U.S. sales." *Id.* In other words, Commerce aggregated data for all foreign like products for all bearing families under review. *See RHP Bearings*, 120 F. Supp. 2d at 1126.

In response to Commerce's *Preliminary Results*, RHP-NSK, along with other interested parties, provided comments. In its comments, RHP-NSK argued that, in its case, Commerce had erred in not using the special rule of 19 U.S.C. § 1677a(e) in computing constructed export price. *Final Results* at 33,338. RHP-NSK suggested that the value added by further processing to its exported bearings exceeded Commerce's 65% threshold and that the statute therefore required that Commerce use the special rule. *Id.* Commerce rejected this argument in the *Final Results*, stating that the decision to apply the special rule was discretionary. According to Commerce:

> the special rule for further manufacturing exists in order to reduce the Department's administrative burden. * * * [Section 1677a(e)] of the Act [] provides that the Department need only apply the special rule where it determines that the use of such alternative calculation methodologies is appropriate. We retain the authority to refrain from applying the special rule in those situations where the value added, while large, is simple to calculate.

Final Results at 33,338.

Regarding Commerce's calculation of the profit component of constructed value for purposes of arriving at a normal value for the bearings under review, several interested exporters responded by criticizing Commerce's use of aggregated data from all families of bearings. Specifically, it was argued that giving "foreign like product" two different meanings when applying the provisions for determining normal value was improper and contrary to the definition of the term "foreign like

[5] Bearing "family" is defined in the *Preliminary Results*: "a bearing family consists of all bearings within a class or kind of merchandise that are the same in the following physical characteristics: load direction, bearing design, number of rows of rolling elements, precision rating, dynamic load rating, outer diameter, inner diameter, and width." *Preliminary Results* at 6516.

product" in 19 U.S.C. § 1677(16). *Final Results* at 33,334.[6] In response, Commerce stated that

> an aggregate calculation that encompasses all foreign like products under consideration for normal value represents a reasonable interpretation of [19 U.S.C. § 1677b(e)(2)(A)]. Moreover, we believe that, in applying the preferred method for computing CV profit under [19 U.S.C. § 1677b(e)(2)(A)], the use of aggregate data results in a reasonable and practical measure of profit that we can apply consistently in each case.

Id. at 33,333.

Pursuant to 28 U.S.C. § 1581(c), RHP-NSK challenged Commerce's *Final Results* determinations before the Court of International Trade. The Torrington Company intervened as a defendant in the litigation.

III.

Upon the administrative record, the Court of International Trade, upheld Commerce's anti-dumping determinations in the *Final Results*. *RHP Bearings*, 120 F. Supp. 2d 1116. The court agreed with the government that, under 19 U.S.C. §1677a(e), Commerce had discretion in deciding whether to apply the special rule. *Id.* at 1125. In doing so, it relied on the language of section 1677a(e) which states that the special rule may be used "if * * * the administering authority determines that the use of such sales is appropriate." *Id.* The court concluded that Commerce had properly determined that the rule is inappropriate "in those situations where the value added, while large, is simple to calculate." *Id.* at 1126 (quoting *Final Results* at 33,338).

The Court of International Trade also upheld Commerce's use of all foreign like products under consideration for purposes of calculating the profit component of constructed value in determining normal value. *RHP Bearings*, 120 F. Supp. 2d at 1126–27. The court relied upon a prior Court of International Trade decision, *RHP Bearings Ltd. v. United States*, 83 F. Supp. 2d 1322 (Ct. Int'l Trade 1999). In that case, the court held that an identical method of calculating constructed value profit, which used aggregate data of all foreign like products under consideration in order to determine normal value under 19 U.S.C. §1677b(e)(2)(A), was consistent with the antidumping statute. *RHP Bearings*, 120 F. Supp. 2d at 1126.

RHP-NSK has timely appealed the Court of International Trade's determination on these two issues. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

I.

"When reviewing anti-dumping determinations made by Commerce, this court applies anew the standard of review applied by the Court of

[6] As seen above, Commerce concluded that RHP-NSK's home market sales of foreign like product were below cost and therefore could not provide a basis for normal value. In reaching that conclusion, Commerce used data from sales of identical bearings and bearings within the same bearing family—a definition of foreign like product not followed in Commerce's later calculation of the constructed normal value.

International Trade in its review of the administrative record." *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1031 (Fed. Cir. 2000). We uphold Commerce's determination unless it is "unsupported by substantial evidence on the record or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

On appeal, RHP-NSK renews its challenge to Commerce's determination of constructed export price and normal value. Specifically, RHP-NSK takes issue with Commerce's determination to adjust the price used to arrive at constructed export price by reducing that price by the cost of further manufacture or assembly, as contemplated by 19 U.S.C. § 1677a(d)(2). According to RHP-NSK, Commerce should have followed the approach of the special rule set forth in 19 U.S.C. § 1677a(e). As seen above, that section provides that, in specified circumstances, constructed export price is to be constructed from analogous sales of subject merchandise. RHP-NSK contends that the specified circumstances existed in this case. As far as normal value is concerned, RHP-NSK challenges Commerce's determination to calculate the profit component of constructed value under 19 U.S.C. §1677b(d)(2)(A) using "aggregate data" from reported home market sales of anti-friction bearings.

RHP-NSK's contentions implicate two issues of statutory interpretation. The first is whether section 1677a(e), the "Special Rule for Merchandise With Value Added After Importation," particularly mandates its use to calculate constructed export price in circumstances where the value added by additional manufacture substantially exceeds that of the subject merchandise. The second issue of statutory interpretation concerns Commerce's treatment of the term "foreign like product" as used in section 1677b(e)(2)(A) to calculate constructed value profit.

II.

We review questions of statutory interpretation without deference. *U.S. Steel Group v. United States*, 225 F.3d 1284, 1286 (Fed. Cir. 2000). In reviewing an agency's construction of the statute that it administers, we address two questions as required by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, we and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, Congress has not spoken directly on the issue, we address the second question of whether the agency responsible for filling a gap in the statute has rendered an interpretation that "is based on a permissible construction of the statute." *Id.*; *see also Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1308 (Fed. Cir. 2001).

III.

A. The Special Rule Issue.

RHP-NSK argues that a reading of 19 U.S.C. §§ 1677a(d)(2) and (e) compels the conclusion that Commerce must apply the special rule whenever "the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise." 19 U.S.C. § 1677a(e). In making this argument, RHP-NSK points to section 1677a(d)(2), which states that the price used to establish constructed export price shall be reduced by "the cost of any further manufacture or assembly (including additional material and labor), *except* in circumstances described in subsection (e) of this section." (emphasis added). According to RHP-NSK, the word "except" is an unambiguous expression of the intent of Congress that section 1677a(d)(2) is not to apply in the circumstances described in subsection (e). RHP-NSK also argues that a reading of section 1677a(e) makes clear that application of the special rule is mandatory once it has been determined that the value of the imported product is substantially outweighed by the value added by further manufacturing in the United States. RHP-NSK bases this on the inclusion of the word "shall" in the statute:

> Where the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, the administering authority *shall* determine the constructed export price for such merchandise by using one of the following prices. * * *

19 U.S.C. § 1677a(e) (emphasis added).

The government and Torrington respond that the statute confers broad discretion upon Commerce to determine whether to apply the special rule. Both parties argue that RHP-NSK ignores the parts of the statute quoted below. They contend that these provisions support the proposition that Commerce has discretion in selecting a methodology for the calculation of constructed export price:

> [T]he administering authority shall determine the constructed export price for such merchandise by using one of the following prices *if* there is a sufficient quantity of sales to provide a reasonable basis for comparison *and the administering authority determines that the use of such sales is appropriate*:
>
> (1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> (2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> *If* there is not a sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) or (2), *or the administering authority determines that neither of the prices described in such paragraphs is appropriate, then the constructed export price may be determined on any other reasonable basis.*

19 U.S.C. §1677a(e) (emphasis added). According to the government and Torrington it is clear from the statutory language that application of the special rule is not mandatory, and is clearly subject to the discretion of Commerce.

The parties' contentions squarely frame the issue before us. The first part of 19 U.S.C. § 1677a(e) states the circumstances in which the special rule comes into play: "[w]here the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise." Neither Commerce nor Torrington alleges that such circumstances do not exist here. Therefore, the question we must answer is whether, when the triggering circumstances exist, section 1677a(e) requires Commerce to compute constructed export price using one of the two methodologies set forth in section 1677a(e), or whether, when such circumstances exist, Commerce has discretion under the statute to calculate constructed export price in the manner provided in sections 1677a(c) and (d), which is what Commerce did in this case.

Turning to the first prong of the *Chevron* analysis, we conclude that Congress "has directly spoken to the precise question at issue" in this case: whether, when the triggering circumstances set forth in 19 U.S.C. § 1677a(e) are present, Commerce has discretion to apply or not to apply the special rule of section 1677a(e). Specifically, we conclude that Congress has directly expressed the intent to allow Commerce to determine, when the triggering circumstances of section 1677a(e) are present, whether application of the special rule is appropriate. Stated another way, Congress has directly expressed the intent to allow Commerce to exercise its discretion when faced with the circumstances described in section 1677a(e).

Turning to the statutory language, we note that even when the circumstances set forth in section 1677a(e) are present, the prices in sections 1677a(e)(1) and (2) are not used for constructed export price unless two further conditions are met: (1) there is a "sufficient quantity" of sales of the kind described in subsections (1) and (2) "to provide a reasonable basis for comparison" and (2) Commerce "determines that the use of such sales is appropriate." 19 U.S.C. § 1677a(e). At the same time, the final section of section 1677a(e) states that if Commerce determines that neither of the prices described in paragraphs (1) or (2) of subsection (e) is appropriate, "then the constructed export price may be determined on any other reasonable basis." *Id.* We do not think that the language of the statute could present a clearer grant of discretion to Commerce.

The legislative history also evidences the intent of Congress to make the application of the special rule discretionary. It explains that the chief purpose of Congress in creating the special rule was to ease administrative burden. According to the "Statement of Administrative Action" ("SAA") from the URAA, HR Doc. No. 316,103 Cong., 2d Sess. (1994), Vol. 1:

> New section [1677a](e) establishes a simpler and more effective method for determining export price in situations were an affiliated importer adds value to subject merchandise after importation. For example, if roller chain subject to an antidumping order is imported by an affiliated importer for incorporation into a motorcycle which then is sold to an independent party, there would be an enormous

> burden on Commerce if it were required to "back out" from the price of the motorcycle all of the value added in the United States to work back to the constructed export price of the roller chain. * * * *To avoid imposing an unnecessary burden on Commerce, section [1677a](e) authorizes* Commerce to determine export price based on alternative methods. * * *

SAA, HR Doc. No. 316, at 825–26 (emphasis added).[7] It is clear from this passage that Congress did not intend for the special rule to dictate to Commerce a particular method for calculating constructed export price. Rather, the special rule was meant to simplify what was considered a rather complicated analysis by offering alternatives. The statutory language and the SAA compel the conclusion that the special rule is, as Commerce has asserted, a discretionary provision.

Having concluded that section 1677a(e) gives Commerce discretion in determining whether the special rule should be applied, our *Chevron* inquiry is at an end. The next question we might expect to address is whether Commerce acted reasonably in exercising that discretion. *See AK Steel Corp. v. United States*, 192 F.3d 1367, 1371 (Fed. Cir. 1999) ("[O]ur analysis is not whether we agree with Commerce's conclusions, nor whether we would have come to the same conclusions reviewing the evidence in the first instance, but only whether Commerce's determinations were reasonable."); *United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) ("Thus, the question in this case is not whether we agree with the Commission's decision, nor whether we would have reached the same result as the Commission had the matter come before us for decision in the first instance. By statute, Congress has allocated to the Commission the task of making these complex determinations. Ours is only to review those decisions for reasonableness."). In this case, however, RHP-NSK relies solely on its argument that, whenever the triggering circumstances are present, section 1677a(e) mandates application of the special rule. RHP-NSK does not argue that, assuming Commerce has discretion, it nevertheless acted unreasonably in this case. Accordingly, as far as the special rule is concerned, the only thing left for us to do is affirm the conclusion of the Court of International Trade.

B. Calculation of Normal Value.

As seen above, Commerce resorted to a constructed value methodology in determining normal value for purposes of its analysis in the eighth administrative review. *See* 19 U.S.C. § 1677b(a)(4). RHP-NSK contends that, in that context, Commerce's use of aggregate data for *all* foreign like products to calculate the profit component of constructed value was contrary to 19 U.S.C. § 1677b(e)(2)(A), which refers only to "sale of *a* foreign like product." In the alternative, RHP-NSK argues that Com-

[7] The importance of the SAA in interpreting the URAA enactments is made clear in 19 U.S.C. § 3512(d), which states that "[t]he statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." *See also Micron Tech*, 243 F.3d at 1309.

merce's use of aggregate data for "foreign like product" in section 1677b(e)(2)(A) conflicts with Congress's definition of the term in 19 U.S.C. § 1677(16). It asserts that because Congress created a hierarchy of preferred definitions for "foreign like product" in section 1677(16), Commerce is required to use a consistent definition throughout its application of the antidumping provisions. In other words, if Commerce determines that it can make a satisfactory determination as to "foreign like product" for the purpose of calculating normal value based upon the first definition of the term, *see* 19 U.S.C. § 1677(16)(A), then Commerce should apply that definition throughout the normal value calculation. However, as discussed above, in going through the process of calculating normal value, Commerce used the definition "identical bearings and bearings of the same family" for foreign like products as a basis for its price based calculation under 19 U.S.C. § 1677b(a)(1)(B)(i) and later abandoned this definition in favor of aggregate data for all foreign like products under consideration in its constructed value profit calculation under 19 U.S.C. § 1677b(e)(2)(A). RHP-NSK argues on appeal that this interpretation of sections 1677b(e)(2)(A) and 1677(16) was arbitrary and capricious.

The same issue was presented recently in *SKF USA Inc. v. United States*, 263 F.3d 1369 (Fed. Cir. 2001). In *SKF*, another bearing manufacturer who was subject to Commerce's eighth administrative review raised the identical issue that is presented here—whether the term "foreign like product" should be applied consistently for the price-based calculation of normal value under 19 U.S.C. § 1677b(a)(1)(b)(i) and the calculation of the profit component of constructed value as a substitute for normal value under 19 U.S.C. § 1677b(e)(2)(A). *Id.* at 1376. We stated that where Congress had used the term "foreign like product" in several sections throughout the antidumping act, and specifically defined the term in 19 U.S.C. § 1677(16), we would presume that Congress intended that the term have the same meaning in each reference. *Id.* at 1382. In *SKF*, as in this case, Commerce argued that resort to the aggregate data definition of "foreign like product" in section 1677(16) was reasonable in the context of a constructed value profit calculation under § 1677b(e) even though it had not used that definition in calculating normal value under § 1677b(a)(1)(B)(i). We noted, however, that Commerce had not explained its justification for inconsistent use of the term in its analysis. We held that "[w]ithout an explanation sufficient to rebut th[e] presumption [that terms are meant to be used consistently throughout a statute], Commerce cannot give the term "foreign like product" a different definition (at least in the same proceeding) when making the price determination and in making the constructed value determination." *Id*.

We therefore concluded that Commerce's actions were arbitrary, relying on the decision of the District of Columbia Circuit in *Transactive Corp. v. United States*, 91 F.3d 232, 237 (1996), for the proposition that "an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *See SKF*, 263 F.3d at

1382. We vacated the decision of the Court of International Trade that had sustained Commerce's determination and remanded the case for Commerce to explain its use of multiple foreign like products in its calculations. *Id* at 1382. In light of our decision in *SKF*, we vacate the judgment of the Court of International Trade with respect to Commerce's constructed value profit calculations and remand for further proceedings on that issue.

CONCLUSION

For the foregoing reasons, the decision of the Court of International Trade is

COSTS

Each party shall bear its own costs.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.

XEROX CORP., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01–1124

(Decided May 6, 2002)

John M. Peterson, Neville, Peterson & Williams, of New York, New York, argued for plaintiff-appellant. With him in the brief were *George W. Thompson* and *Curtis W. Knauss*.

James A. Curley, Attorney, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, Department of Justice, of Washington, DC; and *Joseph I. Liebman*, Former Attorney in Charge, International Trade Field Office.

Appealed from: United States Court of International Trade
Judge THOMAS J. AQUILINO, JR.

Before MAYER, *Chief Judge*, RADER and GAJARSA, *Circuit Judges*.

MAYER, *Chief Judge*.

Xerox Corporation appeals the judgment of the Court of International Trade dismissing its appeal from a formal protest with the U.S. Customs Service for lack of subject matter jurisdiction. *Xerox Corp. v. United States*, 118 F. Supp. 2d 1353 (Ct. Int'l Trade 2000). Because ministerial errors by the Customs Service in its administration of antidumping duty orders may be proper subjects of Customs protests and jurisdiction was proper, we reverse and remand.

BACKGROUND

In 1994 and 1995, Xerox Corporation ("Xerox") imported shipments of rubber and plastic feed belts from Japan to be used for carrying paper across the light-platen or scanner-platen of photocopiers. Both entry summaries for the belts included a reference to the *Antidumping Duty Order of Sales at Less Than Fair Value; Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan*, 54 Fed. Reg. 25,314 (June 14, 1989). The order covered "industrial belts used for power transmission * * * in part or wholly of rubber or plastic, and containing textile fiber (including glass fiber) or steel wire, cord or strand." *Id.* Both entries were liquidated in June of 1996.

Pursuant to the antidumping duty order, the Customs Service ("Customs") levied a 93.16 percent ad valorem duty on the belts. Xerox challenged the imposition of the duty by filing a timely formal protest with Customs under 19 U.S.C. § 1514(a)(2). Customs denied the protest, and Xerox appealed to the Court of International Trade under 28 U.S.C. § 1581(a). Xerox argued to the court that its belts are not encompassed by the antidumping duty order because they are neither used for power transmission, nor are they reinforced. And because the belts are clearly outside the scope of the order, Customs made a ministerial error in administering the order and Xerox is due a refund of the duty deposit.

The court stated that the proper remedy for such an error is not a Customs protest, but a scope determination by the Department of Commerce ("Commerce") under 19 U.S.C. § 1516a(a)(2)(B)(vi) as to whether the subject merchandise is described in the order. Such a scope determination would then be appealable to the court under 28 U.S.C. § 1581(c). The court dismissed for lack of subject matter jurisdiction. Xerox filed this timely appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

Discussion

Jurisdiction is an issue of law. *Nichimen Am., Inc. v. United States*, 938 F.2d 1286, 1288 (Fed. Cir. 1991). We review decisions of the Court of International Trade dismissing for lack of subject matter jurisdiction *de novo*. *Friedman v. Daley*, 156 F.3d 1358, 1360 (Fed. Cir. 1998); *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995). This case calls upon us to distinguish between those issues which arise in the administration of antidumping duty orders which require a scope inquiry by Commerce, and those which are protestable to Customs.

The Tariff Act of 1930 instructs Commerce to determine whether foreign merchandise is being sold or is likely to be sold in the United States at less than its fair value. 19 U.S.C. § 1673 (1994). Concurrently, the International Trade Commission conducts an injury inquiry. If the International Trade Commission concludes that domestic industries are being materially injured or threatened with material injury by the foreign merchandise, Commerce proceeds to determine the class or kind of merchandise at issue and the margin at which it is being "dumped" or sold at less than fair value. *Id.* Commerce issues an antidumping duty order specifically describing the subject merchandise and designating its applicable rate of duty. *Id.* § 1673e(a)(2), (3). If a question arises as to whether merchandise is encompassed by an order, an interested party may request a scope inquiry by Commerce under 19 U.S.C. § 1516a(a)(2)(B)(vi), to determine if "a particular type of merchandise is within the class or kind of merchandise described in an existing * * * antidumping * * * duty order." The determination is appealable to the Court of International Trade under its exclusive jurisdiction set forth in 28 U.S.C. § 1581(c) for actions "commenced under section 516A of the Tariff Act of 1930."

Customs is charged with the ministerial function of fixing "the amount of duty to be paid" on subject merchandise. 19 U.S.C. § 1500(c) (1994). When merchandise may be subject to an antidumping duty order, Customs makes factual findings to ascertain what the merchandise is, and whether it is described in an order. *See Marcel Watch Co. v. United States*, 11 F.3d 1054, 1056 (Fed. Cir. 1993) (stating that Customs makes similar factual determinations to classify merchandise under tariff headings). If applicable, Customs then assesses the appropriate antidumping duty. 19 U.S.C. § 1673e(a)(1) (1994); 19 C.F.R. § 351.211(b)(1) (2001). Such findings of Customs as to "the classification and rate and amount of duties chargeable" are protestable to Customs under 19 U.S.C. § 1514(a)(2). Denial of protests are reviewable by the Court of International Trade. 28 U.S.C. § 1581(a) (1994) (Exclusive jurisdiction lies for actions "commenced to contest the denial of a protest * * * under section 515 of the Tariff Act of 1930.")

In this case, the court, relying on our decision in *Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1998) (consolidating appeals of *Sandvik Steel Co. v. United States*, 957 F. Supp. 276 (Ct. Int'l Trade 1997), and *Fujitsu Ten Corp. of Am. v. United States*, 957 F. Supp. 245 (Ct. Int'l Trade 1997)), stated that antidumping determinations generally may not be protested to Customs, and therefore this Customs error requires a scope inquiry by Commerce. In *Sandvik*, we affirmed the Court of International Trade's dismissal for lack of jurisdiction when importers Sandvik Steel Co. ("Sandvik") and Fujitsu Ten Corp. ("Fujitsu") failed to exhaust their administrative remedies. Sandvik imported composite steel tubes with an inner tube of carbon steel covered by stainless steel of which the inner portion constituted seventy-five percent of the weight of the tube. *Sandvik*, 957 F. Supp. at 277. The antidumping duty order covered "stainless steel hollow products * * * including tubes * * * containing over 11.5 percent chromium by weight." *Id.* Sandvik's complaint specifically alleged that the tubes were not encompassed by the order because its tubes contained less than five percent chromium by weight. *Id.* Fujitsu imported "front ends," electronic parts used with automobile radio tuners. *Sandvik*, 164 F.3d at 598. Fujitsu alleged that the front ends were not covered in an antidumping order on "'[t]uners of the type used in consumer electronic products.'" *Id.* (quoting Treasury Dep't Order A–588–014).

We held that the importers should have sought scope rulings from Commerce under 19 U.S.C. § 1516a(a)(2)(B)(vi) because in both cases it was unclear whether the goods at issue were within the scope of antidumping duty orders. *Sandvik*, 164 F.3d at 598–99. We reasoned that Commerce "should in the first instance decide whether an antidumping order covers particular products," because "the order's meaning and scope are issues particularly within the expertise of that agency." *Id.* at 600. Moreover, the statute excludes antidumping determinations, that is, the calculation of duties, and the scope of orders, from matters that can be protested to Customs. *Id.* at 602. And to protect Commerce's administrative authority, neither Customs nor the court should make such determinations. *Id.* at 600.

In this case, however, the scope of the order is not in question, and therefore the reasoning in *Sandvik* does not apply. Xerox asserts that the belts at issue are facially outside the scope of the antidumping duty order and that it did not request a section 1516a(a)(2)(B)(vi) scope determination by Commerce because such an inquiry was unnecessary. We agree. The belts at issue were not used for power transmission and were not constructed with the materials listed in the order, and are clearly outside the order.

Xerox persuasively argues that correcting such a ministerial, factual error of Customs is not the province of Commerce. Instead an importer may file a protest with Customs. In cases such as this, where the scope of the antidumping duty order is unambiguous and undisputed, and the goods clearly do not fall within the scope of the order, misapplication of the order by Customs is properly the subject of a protest under 19 U.S.C. § 1514(a)(2). The Court of International Trade may review the denial of such protests under 28 U.S.C. § 1581(a). And pursuant to 19 U.S.C. § 1515(a), "any duties * * * found to have been assessed or collected in excess shall be remitted or refunded." This appeal from Customs' denial is reviewable by the court.

CONCLUSION

Accordingly, the judgment of the Court of International Trade is reversed and the case is remanded for proceedings in accordance with this opinion.

REVERSED AND REMANDED

HARTOG FOODS INTERNATIONAL, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01–1229

(Decided May 17, 2002)

Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, of New York, New York, argued for plaintiff-appellant. With him on the brief was *Kevin W. Leonard*.

James A. Curley, Attorney, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC; and *Joseph I. Liebman*, Former Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Chi S. Choy*, Attorney, Office of Assistant Chief Counsel, U.S. Customs Service, of New York, New York.

Appealed from: United States Court of International Trade
Judge JANE A. RESTANI

Before CLEVENGER, RADER, and PROST, *Circuit Judges*.

RADER, *Circuit Judge*.

On summary judgment, the United States Court of International Trade affirmed the United States Customs Service's denial of interest on Hartog Foods International, Inc.'s drawbacks. Because 19 U.S.C. § 1505 (2000) does not expressly and unequivocally waive sovereign immunity for interest awards on drawbacks, this court affirms.

I.

Hartog imported strawberry and cranberry juice products on April 19, 1990 and February 6, 1992, and paid the estimated regular duties for each entry. After importation, Hartog discovered that the juices may have originated in the European Community, thus requiring payment of an additional 100% *ad valorem* duty on each entry. On September 11, 1992, Hartog voluntarily disclosed the additional duty requirement to Customs and paid the duties. By this time, Customs had liquidated both entries. Moreover, Hartog had exported the April 19, 1990 entry. Hartog later exported most of the merchandise from the February 6, 1992 entry. Hartog filed for drawback. Drawback, in this case, refers to a 99% refund of import duties, payable due to export of the dutiable imports. 19 U.S.C. § 1313(a) (2000). Customs granted drawbacks on the estimated regular duties, but denied drawbacks on the *ad valorem* duties. Hartog filed protests in 1992 and 1993 seeking drawbacks on the *ad valorem* duties, which Customs granted in 1998 under new drawback regulations.*
Thus, over five years after Hartog's requests, Customs paid Hartog the appropriate drawbacks, but did not pay interest on the drawbacks.

Hartog timely filed a protest claiming that Customs owed interest on the drawbacks. Customs denied Hartog's protest for interest by allow-

* The parties dispute whether Customs had the authority to grant drawbacks on voluntary tenders, such as Hartog's payment of *ad valorem* duties, before 1998. This court need not reach that issue because Customs' pre-1998 authority to grant drawbacks does not affect the sovereign immunity principles that govern this award of interest on drawbacks.

ing thirty days to lapse after its filing. 19 U.S.C. § 1515(b) (2000). Therefore, Hartog filed this suit in the Court of International Trade. The Court of International Trade affirmed Customs' denial of interest because the drawback moneys did not qualify as "excess moneys deposited" under 19 U.S.C. § 1505(b)–(c) (2000), and because the United States Code does not unequivocally waive sovereign immunity for an award of interest on drawback claims. Hartog appealed to this court. This court has jurisdiction under 28 U.S.C. § 1295(a)(5) (1994).

II.

This court reviews a grant of summary judgment, including statutory interpretation, by the Court of International Trade without deference. *Int'l Light Metals v. United States*, 194 F.3d 1355, 1361 (Fed. Cir. 1999) (*Light Metals I*). Where Customs has officially and reasonably construed an ambiguous statute, this court affords such construction *Chevron* deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Customs' rulings or interpretations that do not qualify as official statutory constructions nevertheless receive a measure of deference proportional to their persuasiveness. *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In this case Customs has not officially interpreted the relevant statutory language. Therefore, this court need not extend any *Chevron* deference. *Texport Oil Co. v. United States*, 185 F.3d 1291, 1294 (Fed. Cir. 1999) (declining *Chevron* deference where Customs' silence suggests no official statutory construction). Further, because Customs denied this protest without an official ruling, this court extends no *Skidmore* deference. This court therefore considers the parties' arguments in this case without deference.

Without an express statutory waiver, the United States is immune from interest. *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986). This "no-interest rule" amplifies this court's obligation to construe waivers of sovereign immunity strictly in favor of the sovereign. This court cannot infer a waiver of sovereign immunity. *Id.* at 318; *Kalan, Inc. v. United States*, 944 F.2d 847, 849 (Fed. Cir. 1991). A party, therefore, receives an interest award only where the United States Code unequivocally authorizes such an award. *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Thus, this court seeks statutory language that unambiguously authorizes an interest award. *International Bus. Mach. Corp. v. United States*, 201 F.3d 1367, 1372–1373 (Fed. Cir. 2000); *Kalan*, 944 F.2d 852. To meet its burden under sovereign immunity principles, Hartog offers the only statutory provision that may satisfy the strict requirement for a waiver, namely 19 U.S.C. § 1505(b). This provision recites:

> (b) Collection or refund of duties, fees, and interest due upon liquidation or reliquidation
>
> The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or *refund any excess moneys deposited, together with interest thereon*, as determined

> on a liquidation or reliquidation. Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment. Refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation.

19 U.S.C. § 1505(b) (emphasis added). Section 1505(b) unambiguously waives sovereign immunity only for interest awards on "excess moneys deposited." Section 1505(c), in turn, explains how to calculate interest on the "excess moneys deposited:"

> (c) Interest
>
> Interest assessed due to an underpayment of duties, fees, or interest shall accrue at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. *Interest on excess moneys deposited shall accrue*, at a rate determined by the Secretary, *from the date the importer of record deposits estimated duties, fees, and interest* or, in a case in which a claim is made under section 1520(d) of this title, from the date on which such claim is made, to the date of liquidation or reliquidation of the applicable entry or reconciliation.

19 U.S.C. § 1505(c) (emphasis added). Hence, drawbacks merit interest awards only if they qualify as "excess moneys deposited" under section 1505(b), and if so qualifying, interest on the drawbacks accrues, as specified by 1505(c), from the date of deposit.

Section 1505 provides no express definition of "excess moneys deposited." The *Oxford English Dictionary* defines "excess" as "beyond the usual or specified amount; beyond what is necessary, proper or right." *Oxford English Dictionary* (2d ed. 1989). This definition is consistent with 19 U.S.C. § 1520(a)(1) (2000), which authorizes refunds on "excess deposits" "[w]henever it is ascertained on liquidation or reliquidation of an entry or reconciliation that more money has been deposited or paid as duties than was required by law to be so deposited or paid." Indeed, both sections 1505 and 1520 are codified under part III (entitled "Ascertainment, Collection and Recovery of Duties"), subtitle III of the Tariff Act of 1930. 19 U.S.C. §§ 1481–1529 (2000).

This court's case law reflects a similar understanding of "excess moneys deposited." For example, in *Travenol Labs., Inc. v. United States*, 118 F.3d 749, 753 (Fed. Cir. 1997), this court stated that "section 1505(c) [ ] relates to interest—specifically, interest owed for either an underpayment or overpayment of estimated duties." Hence, the ordinary meaning of "excess," the definition of "excess deposits" in a related statutory provision, and this court's case law lead to the same conclusion—"excess moneys deposited" refers to an overpayment of estimated duties, i.e., the deposit or payment of money beyond legal requirements.

Customs determines overpayments at liquidation or reliquidation. 19 U.S.C. § 1505(b); *Travenol*, 118 F.3d at 753 (Liquidation or reliquidation "determines whether there has been an overpayment or underpayment, and thus defines the basis upon which interest might be due."). Although an overpayment does not emerge until the final reckoning at liquidation or reliquidation, the payment resulting in an excess occurred at the time of deposit. Thus, the importer makes a payment that is not identified as excess until liquidation or reliquidation. In a typical case, the importer pays estimated duties under a Harmonized Tariff Schedule of the United States (HTSUS) provision only to find—upon correct classification under a different HTSUS provision—the initial deposit was excessive. In such a case, Customs refunds the difference between the initial deposit and the required amount (i.e., the excess) with interest. Indeed, section 1505 sets the interest to accrue from the date of deposit. Thus, the statute implicitly considers the moneys excessive at the time of deposit even though the final reckoning occurs only later at liquidation or reliquidation. Thus, section 1505(c) requires the Customs to pay interest for the entire period during which it possessed the overpayment.

Standard drawback claims, however, present a different scenario. Drawbacks are a privilege, not a right. *United States v. Allen*, 163 U.S. 499, 504 (1896); *see also Swan & Finch Co. v. United States*, 190 U.S. 143, 146–47 (1903) (Because the drawback statute is a grant of privilege, the construction most advantageous to the interests of the government must be adopted.). Drawback refunds do not compensate for duty overpayments, but instead help enforce the United States' policy of "encourag[ing] domestic manufacture of articles for export and * * * allow[ing] those articles to compete fairly in the world marketplace." *Light Metals I*, 194 F.3d at 1364–66; *see also Tide-Water Oil Co. v. United States*, 171 U.S. 210, 216 (1898). The drawback refunds encourage an importer to export and thus prevent certain goods from reaching the United States market. To receive a refund, however, the exporter must comply with all statutory and regulatory requirements of the drawback statutes. For drawback refunds, Customs does not determine that the importer overpaid estimated duties or in any way paid an amount beyond legal requirements. Rather, Customs refunds a portion of the paid duties and fees as an incentive to export. 19 U.S.C. § 1313(a)–(b).

In the present case, Hartog asks for an interest award on standard drawback refunds. Hartog, however, is entitled to drawbacks not because it overpaid duties or fees, but because it complied with the statutory and regulatory requirements for drawbacks. Hartog did not pay any amount in excess of the legal duties owed, and does not claim any improper calculation of the duties. Rather, Hartog seeks only to "draw back" or get back a portion of properly and accurately paid duties. The statutory provision for drawback refunds, however, does not transform properly paid duties and fees into excessive moneys subject to interest awards.

With drawback situations, Customs has not possessed or benefited from possession of erroneous or excessive collections—the underlying rationale for interest on excess payments. Moreover Customs has not held money to which it had no legal entitlement upon final reckoning. At all times, Customs had full entitlement to the funds the importer now seeks to draw back. As the Court of International Trade correctly noted, the import duties are not erroneously or excessively paid just because drawback may be claimed at a later date. Hartog paid the legally required amount, and then complied with the drawback provisions to get some of that payment back. Nonetheless Hartog's payments are not "excess moneys deposited" within the meaning of section 1505.

Hartog, however, argues that even if the moneys were not "excess moneys deposited" before export of the juice products, they "became" excessive upon export of the products. At that time, Hartog contends, Customs was no longer entitled to the duties and "undergranted" or delayed in granting the drawbacks. This contention runs afoul of section 1505(c). As noted earlier, section 1505(c) dictates that interest on excess moneys accrues from the date of deposit. Under Hartog's contention, the interest would thus begin to accrue at a time before the alleged "excess" moneys became "excessive."

In fact, Hartog expresses no view on how to calculate the interest on drawbacks. Perhaps Hartog expects Customs to calculate interest on only the 99% of the deposited duties available for drawback under the drawback statutes. The imprecision and guesswork involved in applying section 1505 to drawbacks, however, underscores that section 1505 simply was not drafted with drawbacks in mind.

Hartog invokes *Travenol* to support its contention. *Travenol* held that liquidation or reliquidation "determines whether there has been an overpayment * * * and [ ] defines the basis upon which interest might be due." *Travenol*, 118 F.3d at 753. This court agrees that liquidation or reliquidation functions as the final reckoning or triggering event to determine whether deposited moneys are excessive, but disagrees that *Travenol* supports any claim to interest on drawbacks. *Travenol* involved a claim to interest on refunds granted as a result of improper classification of the imported articles under the HTSUS. *Id.* at 751. *Travenol* did not involve a drawback claim.

Although the parties cite no precedent from this court holding that standard drawbacks deserve interest under section 1505, this court has addressed interest claims in cases where Customs granted drawbacks and then erroneously required repayment of the granted drawbacks. *See Novacor Chemicals, Inc. v. United States*, 171 F.3d 1376 (Fed. Cir. 1999); *Int'l Light Metals v. United States*, 279 F.3d 999 (Fed. Cir. 2002) (*Light Metals II*). In *Novacor*, this court held that Novacor was not entitled to interest on a drawback granted and then erroneously reclaimed and held by Customs for almost five years. *Novacor*, 171 F.3d at 1382. In so holding, this court determined that 19 U.S.C. § 1520(d) (1988) did not unambiguously provide interest on drawbacks. *Id.* Further, despite Hartog's assertions to the contrary, *Novacor* did not hold that the Customs Modernization Act of 1993 (Modernization Act), which amended 19 U.S.C. § 1505 (1988), authorized interest on drawbacks. The 1988 version of section 1505(b) required Customs to "refund any excess of duties deposited as determined on a liquidation or reliquidation." The amended version requires Customs to "refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation." 19 U.S.C. § 1505(b). In providing for interest on the excessive moneys in the 1993 amendments, title 19 could have, but did not, expressly and unequivocally authorize interest awards on drawbacks.

In *Light Metals II*, Customs initially granted the exporter a drawback. *Light Metals II*, 279 F.3d at 1001. Customs later claimed that the drawback grant was improper and demanded the exporter repay the drawback with interest. *Id.* at 1001–02. After determining that Customs reclaimed the drawback in error, this court affirmed the Court of International Trade's judgment refunding the reclaimed amount plus interest. In so doing, this court sought to place the exporter back into the position it occupied before Customs' error. *Id.* at 1004. This court stated: "The proper way to accomplish that result was to require Customs to repay [the exporter] the drawback [Customs] had allowed in the first instance, together with interest." *Id.* at 1003. *Light Metals II* does not deal with an interest award on standard drawback claims; nor does *Light Metals II* even cite section 1505. In fact, *Light Metals II* does not at any point address sovereign immunity principles that govern award of interest. Moreover, neither party in *Light Metals II* raised the sovereign immunity requirement.

In sum, no matter how unusual or compelling the facts of a case, sovereign immunity principles govern and permit interest only if the United States Code has expressly and unequivocally waived sovereign immunity and authorized such awards. Section 1505 consents to interest awards for "excess moneys deposited." This court must strictly construe the term "excess moneys deposited," and cannot broaden the meaning of such term through judicial interpretation. As noted above, the term "excess moneys deposited" does not expressly and unequivocally include the drawbacks at issue in this case. Sovereign immunity and the "no interest" rule compel great specificity. Section 1505 simply lacks the requisite specificity.

Hartog also argues that this court may award interest on the facts of this case without reaching the broader question of whether section 1505 provides a general entitlement to interest on all drawbacks. Despite the unusual fact that Hartog paid the *ad valorem* duty after export of the first entry, Hartog's request nevertheless asks for interest on a regular drawback claim. Thus, despite Hartog's assertions to the contrary, this court may not grant the requested relief unless drawbacks fall within the express statutory language of section 1505.

CONCLUSION

Because the Court of International Trade correctly held that Hartog's drawbacks are not "excess moneys deposited" under section 1505(b) and that the United States is immune from an interest award in this case, this court affirms.

COSTS

Each party shall bear its own costs.

AFFIRMED

FAG ITALIA S.P.A. AND FAG BEARINGS CORP., PLAINTIFFS-APPELLANTS, AND SKF USA INC. AND SKF INDUSTRIE S.P.A., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-CROSS APPELLANT, AND THE TORRINGTON CO., DEFENDANT-CROSS APPELLANT

Appeal No. 01–1212, 01–1213, 01–1214, 01–1215

(Decided May 24, 2002)

Max F. Schutzman, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, New York, argued for plaintiff-appellant FAG Bearings Corporation and FAG Italia S.p.A. With him on the brief were *Andrew B. Schroth*, *Mark E. Pardo*, and *Adam M. Dambrov.* Of counsel was *Jeffrey S. Grimson*.

Herbert C. Shelley, Steptoe & Johnson LLP, of Washington, DC, argued for plaintiff-appellant SKF USA Inc. and SKF Industrie S.p.A. With him on the brief was *Alice A. Kipel*.

Reginald T. Blades, Jr., Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-cross appellant United States. On the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director; *Velta A. Melnbrencis*, Assistant Director. Of counsel on the brief were *David R. Mason* and *John F. Koeppen*, Attorneys, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Geert De Prest, Stewart and Stewart, of Washington, DC, argued for defendant-cross appellant The Torrington Company. With him on the brief were *Terence P. Stewart* and *Lane S. Hurewitz*.

Appealed from: United States Court of International Trade
Senior Judge NICHOLAS TSOUCALAS

Before MICHEL, DYK, and PROST, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* DYK, in which *Circuit Judge* PROST joins. *Circuit Judge* MICHEL concurs-in-part and dissents-in-part.

DYK, *Circuit Judge*.

This case presents two issues. First, it involves the question whether the Department of Commerce ("Commerce") properly defined "foreign like product" for purposes of 19 U.S.C. §§ 1677b(a)(1) and 1677b(e). In *SKF USA Inc. v. United States*, 263 F.3d 1369 (Fed Cir. 2001), we vacated the Court of International Trade's decision on that identical issue and remanded for Commerce to explain why it uses a different definition of "foreign like product" for price-based calculations for normal value than it does for calculations of constructed value. The parties agree that *SKF USA* governs here, and that we should likewise remand this case to Commerce for further consideration of that issue. Accordingly, we will not discuss the "foreign like product" issue further in this opinion. We vacate the decision of the Court of International Trade on this issue and remand for further proceedings consistent with our opinion in *SKF USA*.

Second, this case involves the question whether Commerce can properly conduct a duty absorption inquiry pursuant to 19 U.S.C. § 1675(a)(4) for "transition orders"[1] in 1996 and 1998, the second and fourth years after the deemed issuance date of transition orders under section 1675(c)(6)(D). We hold that Commerce's action in conducting such inquiries is not authorized by the statute and affirm the judgment of the Court of International Trade in this respect. The opinion that follows addresses that issue.[2]

STATUTORY BACKGROUND

The antidumping statute is designed to prevent foreign goods from being sold at unfairly low prices in the United States to the injury of United States producers. Antidumping orders are issued as a result of a process that involves both Commerce and the ITC.

Commerce decides whether dumping exists by determining whether foreign merchandise has been sold or is likely to be sold in the United States at "less than its fair value." 19 U.S.C. § 1673(1) (2000). Commerce first makes a preliminary determination whether there is a reasonable indication that foreign merchandise is being sold at less than fair value, 19 U.S.C. § 1673b(b)(1)(A) (2000), then establishes dumping margin[3] rates reflecting that amount. 19 U.S.C. §§ 1673d(a)(1), 1673d(c)(1)(B) (2000). The ITC determines whether a domestic industry is "materially injured" or is "threatened with material injury," or whether "the establishment of an industry in the United States is materially retarded" by dumping. 19 U.S.C. § 1673d(b)(1) (2000). If the determinations of Commerce and ITC are both affirmative, Commerce issues an antidumping order assessing duties on the foreign exporter. 19 U.S.C. § 1673d(c)(2) (2000).

Before the amendments to the antidumping statute under the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), the only statutorily authorized review of antidumping orders after they were issued was Commerce's annual administrative review, in which Commerce reviewed the amount of antidumping duty, and recalculated the dumping margin as necessary to reflect actual competitive conditions. 19 U.S.C. § 1675(a)(1) (1988). These annual reviews

[1] "Transition orders" are orders predating January 1, 1995, "the date the WTO Agreement enter[ed] into force with respect to the United States." 19 U.S.C. § 1675(c)(6)(C) (2000).

[2] Contrary to FAG's argument, this case is not moot. The International Trade Commission's ("ITC's") sunset review proceeding is not yet final, and a remand here would require the ITC to consider Commerce's duty absorption determinations.

[3] The "dumping margin" is the total amount by which the price charged for the subject merchandise in the home market exceeds the price charged in the United States. 19 U.S.C. § 1677(35)(A) (2000).

were continued in the URAA amendments. *See* 19 U.S.C. § 1675(a)(1) (2000). Under the URAA amendments, Congress additionally: (1) authorized Commerce to conduct so-called duty absorption inquiries in conjunction with its second and fourth annual administrative reviews of antidumping orders, upon request by an interested domestic party; and (2) provided for a completely new kind of review of antidumping duty orders: sunset reviews, to be jointly conducted by ITC and Commerce five years after the issuance of an order. Sunset reviews eliminate needless antidumping orders by terminating orders after five years, unless ITC and Commerce both determine that revocation of the orders would lead to recurrence of dumping and material injury. Subsection (a) of section 1675 governs duty absorption inquiries. Subsection (c) governs sunset reviews.

DUTY ABSORPTION

The purpose of a duty absorption inquiry is to ensure that foreign exporters identified by Commerce as dumping goods in the United States do not undermine the purpose of the antidumping laws by "absorbing" the duty rather than passing the duty on to United States purchasers in the form of higher prices. In such circumstances, dumping continues despite the assessment of the duty, and, as a result, "the remedial effect of an antidumping order may be undermined * * *." *Joint Report of the Committee on Finance, Committee on Agriculture, Nutrition, and Forestry, Committee on Governmental Affairs of the United States Senate to accompany S. 2467*, S. Rep. No. 103–412, at 44 (1994).

Congress provided that:

> During any [annual] review * * * initiated 2 years or 4 years after the publication of an antidumping duty order, [Commerce], if requested, shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter.

19 U.S.C. § 1675(a)(4) (2000).[4] Section 1675(a)(4) further provides that Commerce "shall notify the [ITC] of its findings regarding such duty absorption for the [ITC] to consider in conducting a [sunset review]."

The consequence of a finding of duty absorption by Commerce is that the anti-dumping order is less likely to be revoked as a result of a sunset review. The Statement of Administrative Action recognized that "[d]uty absorption may indicate that the [foreign] producer or exporter would be able to market more aggressively should the order be revoked as a result of a sunset review." *Uruguay Round Agreements Act: Statement of*

[4] The duty absorption inquiry only applies to affiliated importers. 19 U.S.C. § 1675(a)(4) (2000). The regulations deal separately with the problem of unaffiliated importers who are reimbursed by foreign exporters, providing that Commerce, when calculating the export price, will "deduct the amount of any antidumping duty or countervailing duty which the exporter or producer: (A) Paid directly on behalf of the importer; or (B) Reimbursed to the importer." 19 C.F.R. § 351.402(f) (2001). This has the effect of increasing the duty amount.

Administrative Action ("*SAA*"), H.R. Doc. No. 103–316, at 886 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4211. It was further understood:

> Duty absorption is a strong indicator that the current dumping margins calculated by Commerce in reviews may not be indicative of the margins that would exist in the absence of an order. Once an order is revoked, the importer could achieve the same pre-revocation return on its sales by lowering its prices in the U.S. in the amount of the duty that previously was being absorbed. * * *
>
> *An affirmative finding of absorption* in an administrative review initiated *two years after the issuance of an order is intended to have a deterrent effect* on continued absorption of duties by affiliated importers; *if they engage in duty absorption, they will know that they will face an additional hurdle that will make it more difficult to obtain revocation or termination. If, in the four-year review, Commerce finds that absorption has taken place, it will take that into account in its determination regarding the dumping margins likely to prevail if an order were revoked.*

Id. at 885–86, *reprinted in* 1994 U.S.C.C.A.N. at 4210 (emphases added).

SUNSET REVIEWS

The purpose of the sunset review is to eliminate needless orders by terminating antidumping orders after five years unless Commerce determines that revocation of the duty "would be likely to lead to continuation or recurrence of dumping," and ITC determines that revocation of the duty "would be likely to lead to * * * material injury." 19 U.S.C. § 1675(c)(1) (2000). Unless both agencies make affirmative determinations, the order must be revoked. The sunset review is held "5 years after the date of publication of * * * an antidumping duty order," and every five years thereafter. 19 U.S.C. § 1675(c)(1)(A) (2000); S. Rep. No. 103–412, at 45.

ITC considers several factors in deciding whether revocation would likely lead to material injury. 19 U.S.C. § 1675a(a)(1) (2000).[5] Among other things, the statute provides that in sunset reviews ITC "shall" consider Commerce's two and four-year duty absorption determinations. 19 U.S.C. § 1675a(a)(1)(D) (2000).

TRANSITION ORDERS

There is no issue in this case as to the operation of these duty absorption inquiry or sunset review provisions with respect to antidumping orders issued after January 1, 1995, the date the URAA amendments came into effect in the United States. The controversy concerns orders issued

[5] Section 1675a(a)(1) provides in part:

> The [ITC] shall take into account—
>
> (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued or the suspension agreement was accepted,
>
> (B) whether any improvement in the state of the industry is related to the order or the suspension agreement,
>
> (C) whether the industry is vulnerable to material injury if the order is revoked or the suspension agreement is terminated, and
>
> (D) in an antidumping proceeding under section 1675(c) of this title, the findings of [Commerce] regarding duty absorption under section 1675(a)(4) of this title.

19 U.S.C. § 1675a(a)(1) (2000).

before that date—so called "transition orders." A "transition order" is defined in the statute as "an antidumping duty order * * * which is in effect on the date the WTO Agreement enters into force with respect to the United States," that is, January 1, 1995. 19 U.S.C. § 1675(c)(6)(C) (2000). Congress was well aware that "there likely will be more than 400 of these transition orders" issued before January 1, 1995, and Congress also recognized that "special rules are necessary to enable the agencies to conduct five-year reviews within a reasonable period and in a manner consistent with the [URAA] Agreements." *SAA* at 882, *reprinted in* 1994 U.S.C.C.A.N. at 4208. Congress accordingly explicitly provided for sunset review of transition orders: "[f]or purposes of this subsection [(c)], a transition order shall be treated as issued on the date the WTO Agreement enters into force with respect to the United States." 19 U.S.C. § 1675(c)(6)(D) (2000). Thus, transition orders were deemed issued on January 1, 1995, and subject to a sunset review five years after that date.

In the URAA amendments, Congress did not provide for duty absorption inquiries of transition orders in the second or fourth years after the deemed issuance date. Nonetheless, Commerce has claimed the authority to undertake such duty absorption inquiries for transition orders in the second and fourth years after the deemed issuance date, thus leading to the present proceeding.

Proceedings Below

In 1997, Commerce promulgated a regulation interpreting the statutory scheme as permitting it to conduct duty absorption inquiries of transition orders, if requested, in any annual review initiated in 1996 or 1998. 19 C.F.R. § 351.213(j) (1998).[6] However, this regulation is not binding here, because the review at issue was initiated in 1996, and the regulation applies only to "administrative reviews initiated on the basis of requests made on or after the first day of July, 1997. * * *" *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,416–17 (May 19, 1997). Thus Commerce contradicts itself—on the one hand promulgating a regulation purporting to authorize reviews in 1996, and at the same time stating that that regulation is inapplicable to pre-July 1, 1997, reviews. The regulation nonetheless states Commerce's views that second and fourth year reviews of transition orders *are* authorized by the statute.

This case predates the issuance of that regulation. At issue in this case is the seventh annual administrative review of an antidumping order on antifriction bearings ("AFBs") imported to the United States during the

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[6] 19 C.F.R. § 351.213(j)(2) provides:

(j) *Absorption of antidumping duties*.

(1) During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping order under § 351.211, or a determination under § 351.218(d) (sunset review), the Secretary, if requested * * * will determine whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. * * *

(2) For transition orders defined in section 751(c)(6) of the Act, the Secretary will apply paragraph (j)(1) of this section to any administrative review initiated in 1996 or 1998.

period of May 1, 1995, through April 30, 1996. Plaintiff-appellant FAG-Italia S.p.A. is a manufacturer of AFBs from Italy that are subject to the antidumping order, and plaintiff-appellant FAG Bearings Corporation imports those AFBs (collectively, "FAG"). Plaintiff-appellant SKF USA and plaintiff-appellant SKF Industrie S.p.A. (collectively, "SKF") also manufacture and import Italian AFBs that are subject to the antidumping order.

On May 15, 1989, Commerce issued the antidumping order.[7] On June 20, 1996, Commerce initiated the seventh annual administrative review of this order for the period of May 1, 1995, to April 30, 1996.[8] On June 10, 1997, Commerce published *Preliminary Results* of its review.[9] On October 17, 1997, Commerce published its *Final Results*.[10] In its *Final Results*, Commerce found that FAG and SKF engaged in duty absorption with respect to Italian AFBs. 62 Fed. Reg. at 54,044.

It is undisputed that the underlying order, originally issued May 15, 1989, is a "transition order" with a deemed issuance date of January 1, 1995, for sunset review purposes. 19 U.S.C. § 1675(c)(6)(D) (2000). From the outset of its investigation, Commerce regarded this seventh annual administrative review as the "second year" review for purposes of its duty absorption inquiry, *i.e.*, as a review taking place during the second year after the January 1, 1995, deemed issue date. On May 31, 1996, and July 9, 1996, the Torrington Co. ("Torrington") requested Commerce to determine, with respect to various respondents, whether antidumping duties had been absorbed during the period of review. *Final Results*, 62 Fed. Reg. at 54,075. Commerce proceeded to conduct the duty absorption inquiry, explaining the basis for the inquiry in its *Preliminary Results*:

> The preamble to [Commerce's] proposed antidumping regulations explains that reviews initiated in 1996 will be considered initiated in the second year and reviews initiated in 1998 will be considered initiated in the fourth year. Although these proposed antidumping regulations are not yet binding upon [Commerce], they do constitute a public statement of how [Commerce] expects to proceed in construing [19 U.S.C. § 1675(a)(4)]. This approach ensures that interested parties will have the opportunity to request a duty-absorption determination prior to the time for sunset review of the order under [19 U.S.C. § 1675(c)] on entries for which the second and fourth years following an order have already passed.

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[7] *Antidumping Duty Orders: Ball Bearings and Cylindrical Roller Bearings, and Parts Thereof From Italy*, 54 Fed. Reg. 20,903 (Dep't Commerce May 15, 1989).

[8] *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Duty Administrative Reviews and Notice of Request for Revocation of an Order*, 61 Fed. Reg. 31,506 (Dep't Commerce June 20, 1996) ("*Notice of Initiation*").

[9] *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 62 Fed. Reg. 31,566 (Dep't Commerce June 10, 1997) ("*Preliminary Results*").

[10] *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Administrative Reviews*, 62 Fed. Reg. 54,043 (Dep't Commerce Oct. 17, 1997) ("*Final Results*").

Preliminary Results, 62 Fed. Reg. at 31,568 (citation omitted). Commerce concluded:

> Because these orders on AFBs have been in effect since 1989, these are transition orders in accordance with [19 U.S.C. § 1675(c)(6)(C)]; therefore, based on the policy stated above, [Commerce] will consider a request for an absorption determination during a review initiated in 1996. This being a review initiated in 1996 and a request having been made, we are making a duty-absorption determination as part of these administrative reviews.

Id.

In its *Final Results*, Commerce repeated its rationale for conducting the duty absorption inquiry. 62 Fed. Reg. at 54,074–75. It also found that SKF and FAG failed to put evidence into the record to support their position that they and their affiliated importers were not absorbing the duties, and concluded that duty absorption had occurred. 62 Fed. Reg. at 54,076. SKF and FAG challenged the *Final Results* as they pertain to AFBs from Italy in the United States Court of International Trade.

In *FAG Italia S.p.A. v. United States*, No. 97–11–01984, 2000 WL 978462 (Ct. Int'l Trade July 13, 2000), the Court of International Trade concluded that Commerce lacked statutory authority to conduct a duty absorption inquiry for the transition order in dispute. The court relied on its reasoning in *SKF USA Inc. v. United States*, 94 F. Supp. 2d 1351 (Ct. Int'l Trade 2000), after determining that the duty absorption inquiry and the parties' arguments in this case were "practically identical" to those in *SKF USA*. *FAG Italia* at *5. In the earlier case, the court determined that Commerce lacked authority to conduct a duty absorption inquiry in the ninth administrative review of a transition order, finding that "the deemed January 1, 1995 issuance date of § 1675(c)(6)(D) is inapplicable to the order." *SKF USA*, 94 F. Supp. 2d at 1357. The court found that section 291 of the URAA provided an "'unambiguous directive' from Congress" that the section providing for duty absorption inquiries "must be applied prospectively on or after January 1, 1995 for 19 U.S.C. § 1675 reviews," and accordingly concluded that Commerce lacked authority to conduct the duty absorption inquiry of the transition order at issue. *Id.* at 1358–59 (internal citations omitted). Relying on *SKF USA*, the court in *FAG Italia* remanded to Commerce with instructions to "annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for this review." *FAG Italia* at *8. Upon finding that Commerce complied with the terms of the remand, the court issued its final judgment in *FAG Italia S.p.A. v. United States*, No. 97–11–01984, 2000 WL 1846112 (Ct. Int'l Trade Dec. 15, 2000), dismissing the case.

Commerce and Torrington appealed the Court of International Trade's determination that Commerce lacked statutory authority to conduct the duty absorption inquiry. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

STANDARD OF REVIEW

"'When reviewing anti-dumping determinations made by Commerce, this court applies anew the standard of review applied by the Court of International Trade in its review of the administrative record.'" *SKF USA Inc. v. United States*, 263 F.3d 1369, 1378 (Fed. Cir. 2001) (quoting *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1031 (Fed. Cir. 2000)).

We review questions of statutory interpretation without deference, *U.S. Steel Group v. United States*, 225 F.3d 1284, 1286 (Fed. Cir. 2000), except to the extent that deference to Commerce's interpretation may be required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984).

DISCUSSION

Commerce does not claim that any provision of the statute explicitly authorizes it to conduct duty absorption inquiries as part of its annual review of transition orders in the second and fourth years after January 1, 1995. Nor does Commerce claim that there is any ambiguous language of the statute that might be interpreted to convey such authority.[11] Commerce's concession is well taken. The statute only provides for duty absorption inquiries "[d]uring any review under this subsection [subsection (a), governing annual administrative reviews] initiated 2 years or 4 years after the publication of an antidumping duty order * * *." 19 U.S.C. § 1675(a)(4) (2000). The order in question was published in 1989; the two and four year annual reviews occurred in 1991 and 1993, well before the absorption provision of the URAA was even enacted. The deemed issuance date for transition orders does not change this result. In providing for a deemed issuance date for transition orders, the statute provides that "[f]or purposes of this subsection [subsection (c), governing sunset reviews], a transition order shall be treated as issued" on January 1, 1995. 19 U.S.C. § 1675(c)(6)(D) (2000). There is no provision creating a "treated as" date for transition orders for purposes of subsection (a), the subsection governing duty absorption inquiries. Finally, the statutory provisions governing annual reviews for Commerce do not confer general authority that might include the power

[11] At oral argument, the following exchange took place between the court and counsel for Commerce:

THE COURT: "What is the ambiguous language * * * you're construing?"

COMMERCE: "The ambiguity, if there is one, is the absence of language. There is no specific reference in subsection (a) to the transition orders, but the entire section clearly addresses a program establishing a new program of duty absorption and five year inquiries, and recognizing that there were antidumping orders in existence prior to the establishment of this program, and that this program needs to apply to the transition orders. * * *"

* * * * * * *

THE COURT: "There is no specific ambiguous language— "

COMMERCE: "There is no specific ambiguous language. There is an absence of language. There is a gap that needs to be filled if one wants to read it so restrictively as not applying to transition orders."

to consider duty absorption. 19 U.S.C. §§ 1675(a)(1)(B), 1675(b)(2) (2000).[12]

Commerce nonetheless urges that it has authority to conduct two and four year reviews of transition orders because both the statute and its legislative history are silent as to whether Commerce can conduct duty absorption inquiries in years other than years 2 and 4, and the statute does not explicitly prohibit or deny it such authority.[13]

Commerce seriously misunderstands its role under *Chevron*.[14] The first question we ask under *Chevron* is whether Congress has spoken to the precise question at issue. *Chevron*, 467 U.S. at 842. In the absence of clear direction from the statute, we then ask whether there is ambiguous statutory language that might authorize the agency to fill a statutory gap: "'The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Then we ask whether Commerce's interpretation of ambiguous statutory language is based on a permissible interpretation of the statute. *Id.* at 843 & n.11. But here, Commerce can identify no ambiguities in the statute, nor any statutory "gaps" that Commerce is entitled to fill. Rather, Commerce argues:

> Section 1675(a)(4) * * * only addresses the question of when Commerce *must* conduct a duty absorption inquiry, *i.e.*, under certain enumerated conditions. Thus, left unanswered by section 1675(a)(4) is the proper issue that the case presented—whether the statutory scheme as a whole *precludes* Commerce from conducting a duty absorption inquiry for a transition order. The answer to this question must be in the negative because Congress has stated neither in 19 U.S.C. § 1675(a)(4) nor in any other statutory provision that Commerce is *precluded* from conducting such an inquiry.

Commerce Br. at 46. Given the statutory scheme as a whole and Congress's recognition that Commerce's duty absorption information is useful in ITC's sunset reviews, Commerce argues, Commerce's exercise of its discretion to conduct such reviews serves the purpose of the statute.

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[12] Section 1675(a)(1)(B) provides that, "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of * * * an antidumping duty order," Commerce shall "review and determine * * * the amount of any antidumping duty." 19 U.S.C. § 1675(a)(1)(B) (2000). Section 1675(a)(2) governs the "[d]etermination of antidumping duties," and provides:

> For the purpose of paragraph (1)(B), [Commerce] shall determine—(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry.

19 U.S.C. § 1675(a)(2)(A) (2000).

[13] Torrington argues for an even broader interpretation, urging that Commerce has authority to conduct duty absorption inquiries every second and fourth year after *each successive* sunset review of all orders that survive the initial sunset review. Torrington Br. at 29. We reject this theory. Neither the statute nor its legislative history suggests that Commerce may conduct duty absorption inquiries beyond the initial sunset review, and the plain language of the statute provides that duty absorption inquiries be conducted "2 years or 4 years after the publication of an antidumping duty order. * * *" 19 U.S.C. § 1675(a)(4) (2000).

[14] Even though Commerce's regulations are inapplicable here, we have held that Commerce's administrative determinations are entitled to *Chevron* deference. *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1346–47 (Fed. Cir. 2001).

Thus, Commerce claims that it enjoys plenary power to engage in any activity related to its field of authority not specifically prohibited by Congress, so long as the administrative action will serve a congressional purpose. But no case of which we are aware holds that an administrative agency has authority to fill gaps in a statute that exist because of the absence of statutory authority. To the contrary, the Supreme Court has noted that "an agency literally has no power to act * * * unless and until Congress confers power upon it," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), and has cautioned that "'[t]o supply omissions [within a statute] transcends the judicial function.'" *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 250–51 (1926)).

It is indeed well established that the absence of a statutory prohibition cannot be the source of agency authority. In *Southern California Edison Co. v. Federal Energy Regulatory Commission*, 195 F.3d 17 (D.C. Cir. 1999), the District of Columbia Circuit reiterated that the absence of an express statutory provision cannot be interpreted as giving an agency authority:

> [T]he court has repeatedly rejected the notion that the absence of an express proscription allows an agency to ignore a proscription implied by the limiting language of a statute, reasoning that such an approach requires "tortured statutory interpretation" and is based on the unlikely circumstance as to congressional intent giving agencies "virtually limitless hegemony, a result plainly out of keeping with *Chevron*."

Id. at 24 (citations omitted). At issue in *Southern California Edison* were provisions of the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 796(17)–(18), 824a–3, 824i, 824k (1994), governing statutory entitlements benefiting certain energy producers. The statute expressly defined a "small power production facility" as one that "produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof." 16 U.S.C. § 796(17)(A)(i) (1994). The Federal Energy Regulatory Commission ("FERC") allowed a producer that burned a substantial amount of natural gas to retain its status as a "small power production facility." FERC argued that the provision defining "primary energy source" refers "only to those uses that FERC may *not* consider in determining a facility's primary energy source, but has no bearing upon permissible uses of secondary energy sources." *Id.* at 23 (second and third emphases omitted). The court noted that to adopt FERC's rationale "is to assume a new category of nonconforming uses fueled by such a source that is nowhere mentioned in [the Act] or FERC's regulations and is unnecessary to give meaning to the provisions Congress enacted." *Id.* at 24. The court rejected FERC's interpretation because it "would have the effect of requiring Congress to state expressly" any denial of authority to the agency. *Id.*

Similarly, in *University of the District of Columbia Faculty Ass'n v. District of Columbia Financial Responsibility & Management Assistance Authority*, 163 F.3d 616, 621 (D.C. Cir. 1998), the District of Columbia Circuit noted that "[a]ppellants' premise—that the [agency] has the authority to do anything that is not expressly prohibited by [the governing statute]—is quite extraordinary and we reject it." At issue in that case was the District of Columbia Financial Responsibility and Management Assistance Act of 1995, which expressly gave the agency authority to review and approve new collective bargaining agreements ("CBAs"), but was silent as to whether the agency had authority to modify existing CBAs. *Id.* The agency argued that it was an "enormous stretch" to infer that, when Congress gave the agency authority to review and approve new CBAs, it simultaneously meant to prohibit the agency from modifying existing CBAs, and that it was improper for the district court to assume that, because Congress was silent as to existing CBAs, it meant to exclude such agreements from the agency's authority. *Id.* The court rejected this argument, relying on the "fundamental principle of statutory interpretation" articulated in *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (en banc), *amended by*, 38 F.3d 1224 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1032 (1995):

> The [National Mediation Board] does not even claim that the terms of [the Act] support the authority it asserts. * * * Instead, the Board would have us *presume* a delegation of power from Congress absent an express *withholding* of such power. This comes close to saying that the [National Mediation Board] has the power to do whatever it pleases merely by virtue of its existence, a suggestion that we view to be incredible.

Univ. of Dist. of Columbia Faculty Ass'n, 163 F.3d at 621 (quoting *Railway Labor*, 29 F.3d at 659).

In this case, the statutory silence as to Commerce's power to initiate duty absorption inquiries for transition orders does not give Commerce authority to conduct such inquiries. The fact that Commerce is empowered to take action in certain limited situations does not mean that Commerce enjoys such power in other instances. We cannot speculate that conducting two and four year reviews would serve Congress's purpose where Congress did not authorize such reviews for transition orders.[15] Nor is there any legislative history suggesting that Congress contemplated such two or four year reviews for transition orders.[16]

To be sure, if provisions of the statute were rendered meaningless if the authority Commerce seeks were denied to it, we would have a very

[15] Contrary to Torrington's argument that we should disregard the statutory language because it merely reflects a drafting error resulting from the pressures of fast-track legislation, this is not one of those rare situations in which statutory language can be ignored. *See Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001).

[16] Torrington argues that the duty absorption provisions were enacted to address specific concerns of American producers subject to sunset reviews arising from transition orders, and that Congress therefore must have intended for Commerce to conduct duty absorption inquiries of transition orders as well as new orders, citing testimony of domestic industry before the House Ways and Means Committee. Torr. Br. at 24–25. We doubt that such testimony, even if it existed, would carry much, if any, weight. In any event, the cited testimony relates to the industry's general concerns about duty absorption, and our attention has been drawn to no reference where that testimony focused on duty absorption inquiries specifically with respect to transition orders.

different case. In *SKF USA Inc. v. United States*, 263 F.3d 1369, 1379–80 (Fed. Cir. 2001), we resolved an apparent anomaly in the antidumping statute where the definition of a key statutory term appeared to apply solely to one part of the statute, in which the term did not even appear. Absent our interpretation applying that definition to the part of the statute in which the term actually appeared, the definition was meaningless.

But that is not the situation here. Our interpretation does not render any portion of the statute superfluous. Section 1675(c)(6)(D) fixes the issuance date for transition orders at January 1, 1995. Sections 1675(c)(6)(A)(i) and 1675(c)(6)(A)(ii) provide a schedule under which sunset reviews of transition orders are to be initiated and concluded: "[Commerce] shall begin its [sunset] review of transition orders in the 42d calendar month after the date such orders are issued," that is, January 1, 1995, and "reviews of all transition orders shall be completed not later than 18 months after the 5th anniversary of the date such orders are issued." The "date such orders are issued" refers to the date fixed in section 1675(c)(6)(D), *i.e.*, "the date the WTO Agreement enters into force with respect to the United States." Thus, the purpose of section 1675(c)(6)(D) is to subject transition orders to sunset reviews, by setting the date referred to in section 1675(c)(6)(A)(i).[17] Our interpretation gives meaning to all sections of the statute, including subsection (D).

While the sunset review provision states that the ITC "shall take into account," among other things, "the findings of [Commerce] regarding duty absorption under section 1675(a)(4)," 19 U.S.C. § 1675(a)(1) (2000), and such considerations cannot occur when no findings have been made by Commerce as to transition orders, we think that this minor anomaly is insufficient to confer authority on Commerce to conduct such reviews. Section 1675a(a)(1) must refer only to the situation in which duty absorption inquiries *in fact* exist. Even under Commerce's interpretation of the statute, duty absorption determinations may or may not exist for a particular sunset review (since such determinations, even under Commerce's view, are made only upon request). Commerce itself provides a rationale as to why Congress might have failed to provide authority for duty absorption inquiries as to transition orders: "Given this large number of transition orders that were subject to five-year reviews, it may well be that Congress simply did not wish to overburden Commerce by *requiring* it to conduct duty absorption inquiries for the transition orders." Commerce Br. at 52–53.

In effect, Commerce's interpretation requires the addition of statutory language that Congress did not include. Commerce would have us rewrite section 1675(c)(6)(D) to read "[f]or purposes of this subsection,

[17] The Statement of Administrative Action stated: "New section [1675](c)(6)(A) establishes a schedule for completing five year reviews of transition orders in a timely and efficient manner." *SAA* at 882, *reprinted in* 1994 U.S.C.C.A.N. at 4208.

and subsection (a), a transition order shall be treated as issued on" January 1, 1995. This we cannot do.[18]

In holding that Commerce lacks authority to conduct two and four-year duty absorption inquiries for transition orders, we do not reach the question whether Commerce might have been authorized to conduct duty absorption inquiries as part of the sunset review itself under Commerce's general mandate to "conduct a review to determine * * * whether revocation of the * * * antidumping duty order * * * would be likely to lead to continuation or recurrence of dumping." 19 U.S.C. § 1675(c)(1) (2000); *see also* 19 U.S.C. §§ 1675(d)(2), 1675a(c)(1) (2000). It might be argued that the general authority to conduct a sunset inquiry into the likelihood of continuation or recurrence of dumping (including with respect to transition orders) authorizes Commerce to consider absorption, even though section 1675(a)(4) deals explicitly with that subject. Recently in *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 122 S. Ct. 782, 789–90 (2002), the Supreme Court considered the FCC's authority to regulate pole attachment rates for wireless carriers. Sections 224(a)(1) and 224(d)(2) of the Pole Attachments Act specifically authorized the regulation of pole attachment rates but did not cover wireless carriers. The Court nonetheless interpreted sections 224(b) and 224(a)(4) of the Act, generally granting the FCC authority to "regulate the rates, terms, and conditions for pole attachments," *id.* at 789, as authorizing the FCC to regulate rates for "pole attachments" of wireless carriers, noting that "nothing in § 224(a)(1) or § 224(d)(2) limits § 224(a)(4) or § 224(b)." *Id.* at 790. Thus, despite the fact that the FCC lacked authority to regulate such carriers under certain specific sections of the statute, the Supreme Court found authority in more general provisions of the statute. But Commerce does not here argue that section 1675(c)(1) is a source of authority to conduct duty absorption inquiries for transition orders, and did not purport to exercise any such authority here. We decline to determine if such authority existed.

We affirm the Court of International Trade's determination that Commerce lacked authority to conduct a duty absorption inquiry with respect to this transition order, and we vacate and remand to the Court

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[18] Our decision today is quite consistent with our prior decisions in *Ambassador Division of Florsheim Shoe v. United States*, 748 F.2d 1560 (Fed. Cir. 1984), and *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), and the District of Columbia Circuit's decision in *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 823 (1996). In those cases the agency had general authority to act, and the sole question was whether statutory limitations denied authority. *See Ambassador*, 748 F.2d at 1561–62 (finding that section governing review of countervailing duty orders broadly authorized Commerce to suspend liquidation of those orders); *Smith-Corona*, 713 F.2d at 1575–76 (finding that "the statute does vest broad discretion in the Secretary" to determine price adjustments, and that "[t]he statute does not expressly limit the exercise of the Secretary's authority"); *Mobile Communications*, 77 F.3d at 1404–07 (finding that broad authority in statute's "necessary and proper clause" authorized FCC to require licensee to pay discounted price). The existence of limitations on specific authority have been held not to deny authority under more general provisions. *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 122 S. Ct. 782, 789–90 (2002), discussed below. Here, the agency lacks general authority to act. Commerce also relies on *Daewoo Electronics Co. v. International Union of Electronic, Electrical, Technical, Salaried & Machine Workers*, 6 F.3d 1511, 1520–23 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994). *Daewoo* was a case in which the agency limited its authority beyond what the statute might be read to require—not a situation in which the agency expanded its authority beyond the statute.

of International Trade for a determination of the "foreign like product" issue, consistent with our opinion in *SKF USA*.

COSTS

No costs.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED

MICHEL, *Circuit Judge*, concurring-in-part and dissenting-in-part.

I believe the correct construction of the antidumping laws, reading as a whole the Uruguay Round Agreements Act ("URAA") amendments, is one in which duty absorption inquiries performed under § 1675(a)(4) apply to the five-year sunset reviews of transition orders. Because I cannot agree that logic permits an opposite conclusion, I respectfully dissent from that portion of the majority opinion that holds Commerce lacked the power to conduct the duty absorption inquiries as requested in this case.

According to § 291 of the URAA, the amendments made to the antidumping law "shall take effect on [January 1, 1995] and apply with respect to—* * * (2) *reviews initiated* under [§ 1675] (A) by the administering authority or the Commission on their own initiative *after such date*, or (B) pursuant to a request filed *after such date*." *See* 19 U.S.C. § 1671 *note* (quoting URAA § 291 (emphasis added)).[1] The five-year sunset *review* at issue in this case was initiated after January 1, 1995, so the amendments to the antidumping law apply in this case, even though the *order* was published pre-URAA. The purpose of five-year sunset reviews is to determine whether revocation of the particular antidumping duty order at issue "would be likely to lead to continuation or recurrence" of material injury to domestic firms. 19 U.S.C. § 1675(c). Section 1675a(a), governing the procedure to be followed for making such a determination, states on its face that "[t]he Commission *shall* take into account * * * (D) in an antidumping proceeding under section 1675(c) of this title, the findings of the administering authority regarding *duty absorption* under section 1675(a)(4) of this title." 19 U.S.C. § 1675a(a)(1) (emphasis added). Indisputably, transition orders are antidumping proceedings under § 1675(c). *See* 19 U.S.C. § 1675(c)(6).

When interpreting statutes, our task is to construe what Congress has enacted beginning with the language of the statute itself, giving effect—if at all possible—to every clause and word of the statute. *Duncan v. Walker*, 533 U.S. 167, 172, 174 (2001). We read statutes not in isolation but as a whole, *United States v. Morton*, 467 U.S. 822, 828 (1984), settling on a construction that reduces terms to surplusage *only* where we

[1] The majority notes that the *SKF USA* court found that URAA § 291 "provided an 'unambiguous directive from Congress'" that the section must be applied prospectively." *Ante* at 11. That is true—as to *reviews*. Section 291 plainly states that the effective date covers all reviews under § 1675 after January 1, 1995.

can find no other reasonable reading of the statute. *See Chickasaw Nation v. United States*, 534 U.S. 84, ____, 122 S. Ct. 528, 532 (2001). Furthermore, where our construction involves multiple statutory sections that were enacted simultaneously as part of the same Act, "the duty to harmonize them is particularly acute." *U.S. West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000) (citing *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972)); *accord Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984) (explaining that when different statutory sections are enacted *in pari materia*, "a legislative intent to have them work harmoniously together, and for neither to frustrate the other, or partially repeal it, is very much to be inferred"). With fidelity to these maxims, the majority concedes "we would have a very different case" if its interpretation of the statute rendered any relevant provision meaningless. I believe that this is indeed that very different case.

As part of the amendments under the URAA, Congress provided that Commerce "if requested, shall determine" whether duty absorption has occurred. 19 U.S.C. § 1675(a)(4). The purpose of Commerce's inquiry was manifest: an affirmative finding of duty absorption in years two or four places importers on notice that, should the practice continue, they would face increased difficulty in obtaining a revocation or termination of existing orders at their five-year sunset review. *See* Uruguay Round Agreements Act Statement of Administrative Action at 885–88, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4210–11. To that end, the amendments affirmatively require Commerce to report those findings to the Commission: "The administering authority [Commerce] shall notify the Commission of its findings regarding such duty absorption for the Commission to consider *in conducting a review under subsection (c) of this section*." 19 U.S.C. § 1675(a)(4) (emphasis added). Again, that transition orders are subject to five-year sunset reviews under subsection (c) is not disputed, either by the parties or the majority.

Nevertheless, the majority opines that it "cannot speculate" how such reviews "would serve Congress's purpose where Congress did not authorize such reviews [*i.e.*, duty absorption inquiries] for transition orders." This begs the question—whether Congress authorized duty absorption inquiries for transition orders—and at the same time pays only lip-service to our maxims of statutory construction. We are duty-bound to construe sections 1675(a)(4), 1675(c), and 1675a(a)(1) harmoniously, if at all possible. These sections are easily reconciliable once one recognizes that each sunset review of a duty order must consider duty absorption inquiries if such inquiries have been performed, that transition orders are subject to sunset reviews, and therefore, sunset reviews of transition orders necessarily must consider duty absorption inquiries provided that such inquiries have been performed. One need not look beyond the face of the statute to reach this conclusion, a necessary consequence of which is that, regardless of whether in a specific case an inquiry was *actually* performed, the *possibility* for the Commission to review such an inquiry must always exist. However, no such possibility exists under the court's reasoning.

The majority, deeming itself duty-bound not to "rewrite" the statute to include language that is already reasonably inferable from reading the statute as a whole, instead opts to read out (or, at a minimum, render meaningless) language expressly contained in the statute: the express, affirmative command to the Commission under § 1675a(a)(1) that it consider, during sunset reviews of transition orders, any findings that have been made under § 1675(a)(4). Recognizing this "minor anomaly," the majority attempts to justify it by speculating that § 1675a(a)(1) "must refer only to the situation in which duty absorption inquiries *in fact* exist." Such conjecture buckles under its own weight, however, as today's holding precludes the very existence of such a situation.[2]

Because duty absorption inquiries form a part of the core analysis in determining whether revocation of the antidumping duty order would be likely to lead to continuation or recurrence of material injury to domestics, the antidumping statute provides that they shall be considered by the Commission during sunset reviews of antidumping proceedings under § 1675(c). Transition orders are antidumping proceedings under § 1675(c). And because reviews at issue in this case were initiated after January 1, 1995, the URAA amendments to the antidumping statute govern this case. Therefore, in light of the entire statutory scheme, I believe that Congress intended such inquiries to apply to transition orders. To the extent the majority concludes otherwise, I respectfully dissent.

[2] Duty absorption inquiries did not exist before the URAA amendments, and today's holding (1) rejects Commerce's argument that it has plenary power to conduct the reviews; (2) precludes duty absorption inquiries in years 1996 and 1998; and (3) precludes duty absorption inquiries in the second and fourth years leading up to any subsequent sunset review, *see ante* at 14 n.13. Thus, no inquiry for a transition order would ever exist *in fact*. Although the court leaves open the question whether Commerce might initiate its own inquiry during the sunset review, such a scenario is decidedly at odds with: (1) § 1675(a)(4)'s requirement that Commerce perform an inquiry "if requested"; (2) the requirement that the Commission review "findings * * * under § 1675(a)(4)"; and (3) the court's holding that Commerce lacks plenary authority to initiate *sua sponte* such a request in years two and four.